SUPREME COURT, U.S.
FILED

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No. OFFICE OF THE CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

EUGENE H. DUFFY, *et al.*,
Petitioners,

v.

JAMES W. WETZLER, *et al.*,
Respondents.

Petition for a Writ of Certiorari to the Supreme Court of the State of New York Appellate Division-Second Judicial Department

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Supreme Court of the State of New York, Appellate Division, Second Judicial Department was required by this Court's mandate in *Duffy v. Wetzler,* 113 S. Ct. 3027 (1993) to reconsider all matters fairly within the questions presented to this Court in that petition.

2. Whether a claim for damages brought under 42 U.S.C. § 1983 in a state court may be defeated by the assertion of parochial state procedural and substantive defenses in which such defenses would not be available if the action had been brought in a federal forum.

3. Whether the Constitution requires that meaningful backward-looking relief be provided to taxpayers who are ensnared by a State's tactic of constantly changing the rules concerning the remedies putatively available for unconstitutional taxation.

PARTIES TO THE PROCEEDING

The parties to this action are Eugene H. and Alice G. Duffy, James Sweezy,* Fernando S. Maura on behalf of themselves and on behalf of all others similarly situated; ** and Respondents James W. Wetzler, individually and as New York State Commissioner of Taxation and Finance, Roderick G.W. Chu, individually, Edward V. Regan, individually and as Comptroller of the State of New York, Anthony Shorris, Stanley F. Grayson, Abraham Biderman and Paul Crotty, individually and as present or former Commissioners of Finance of the City of New York, and the City of New York.

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* Agnes Sweezy, wife of James Sweezy, who was a party to the proceedings below, died on July 31, 1992. James Sweezy is Agnes Sweezy's successor-in-interest.

** In the proceedings below, the petitioners' motion to certify this case as a class action on behalf of similarly situated civilian and military annuitants of the federal government was denied.

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PETITION FOR A WRIT OF CERTIORARI

Eugene H. Duffy, Alice G. Duffy, James Sweezy and Fernando S. Maura, on behalf of themselves and all others similarly situated, respectfully petition this Court for a writ of certiorari to the Supreme Court of the State of New York, Appellate Division, Second Judicial Department (the "Second Department").

OPINIONS BELOW

The Decisions and Orders of the Second Department dated August 8, 1994, sought to be reviewed are reported at 616 N.Y.S.2d 48 and 616 N.Y.S.2d 213 (1994). They are reprinted in the appendix hereto at App. A at 1a ("Duffy II").

Previously, the Second Department, in its decision reported at 579 N.Y.S.2d 684 (1992) and reprinted in the appendix hereto as App. B at 7a ("Duffy I"), affirmed in part and reversed in part the decision of the Supreme Court of the State of New York, Queens County (the Honorable Alan LeVine). The Supreme Court of the State of New York's decision is reported at 555 N.Y.S.2d 543 (1990), and is reprinted in the appendix hereto at App. C at 25a. Its order and judgment are reprinted in the appendix hereto at App. D at 39a.

Petitioners filed a petition for a writ of certiorari to the Second Department in *Duffy I*. The Court granted the petition, vacated the judgment in *Duffy I* and remanded the case to the Second Department for further consideration in light of *Harper v. Virginia Dep't of Taxation,* 113 S. Ct. 2510 (1993) ("*Harper*"). The mandate of the Court is reported at 113 S. Ct. 3027 (1993) and is reprinted in the appendix hereto at App. E at 45a.

In *Duffy II,* on remand, the Second Department dismissed, on the State's and City's consent, their appeals of Justice LeVine's decision and refused to reexamine the rest of its earlier decision in *Duffy I*. It is from this action that this petition for a writ of certiorari is addressed.

JURISDICTION

The opinion of the Second Department was entered on August 8, 1994. Petitioners sought review of that opinion. On August 15, 1994, petitioners filed a motion for leave to appeal to the New York State Court of Appeals pursuant to N.Y. Civ. Prac. L. & R. 5602(a)(1)(i) and 5514(a). The New York State Court of Appeals denied petitioners' motion by order dated September 1, 1994, which is reprinted in the appendix hereto at App. F at 46a. Jurisdiction to review the decision herein by writ of certiorari is conferred upon this Court by 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

4 U.S.C. § 111 provides in relevant part:

> The United States consents to the taxation of pay or compensation for personal service as an officer or employee of the United States . . . by a duly constituted taxing authority having jurisdiction, if the taxation does not discriminate against the officer or employee because of the source of the pay or compensation.

42 U.S.C § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory of the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

The Supremacy Clause of the United States Constitution, Article VI, Cl. 2 provides in relevant part:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any thing in the Constitution or Laws of any State to the contrary notwithstanding.

The Due Process Clause and Equal Protection Clause of the United States Constitution, Amendment XIV, provide in relevant part:

> . . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Pertinent provisions of the statutory schemes of the State and City of New York, as well as the provisions of the CPLR are set forth in App. G at 47a.

STATEMENT OF THE CASE

This is the second time that petitioners have sought a writ of certiorari to the Second Department in connection with a challenge to the denial of a clear and certain remedy for the recovery of taxes imposed on federal retirees in violation of 4 U.S.C. § 111 and remedies related thereto.

Despite the fact that *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803 (1989), held that such taxes were illegal and unconstitutional, and that *Harper* held that *Davis* must be given retroactive effect, many, if not most, of the states that imposed such unconstitutional taxes have been engaged in a war of attrition designed to avoid or minimize the payment of refunds and related remedies to federal retirees. New York is one of those states.

In the aftermath of *Harper*, this Court granted the prior petition in this case, *Duffy v. Wetzler*, 113 S. Ct. 3027 (1993), for a writ of certiorari to the Second Department. The petition was granted on the two questions presented therein; the decision in *Duffy I* was vacated and the case was remanded to that court for further consideration in light of *Harper*.

For exactly one year after the remand, the respondents continued to oppose the payment of any refunds or the granting of any other relief. Finally, recognizing that their predeprivation defenses, like those in *Reich*,[1] were without merit, the respondents abandoned them. On June 27, 1994, New York State unilaterally announced that it would provide limited relief only to those taxpayers whom it deemed had timely filed for refunds. This announcement

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[1] *See Reich v. Collins*, 114 S. Ct. 1048 (1994). The respondents have also challenged the availability of backward-looking relief as is at issue in the pending petition in the *Davis*-related case of *Swanson v. North Carolina*, 441 S.E.2d 537 (N.C. 1994), *petition for cert. filed*, 62 U.S.L.W. 3827 (U.S. May 25, 1994) (No. 93-1882). *See also James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529 (1991), *on remand*, 437 S.E.2d 782 (Ga. 1993), *petition for cert. filed*, 62 U.S.L.W. 3503 (U.S. Jan. 13, 1994) (No. 93-1140).

came without any consultation or advance notice to counsel, without notice and opportunity to be heard having been afforded putative class members and without any approval by or supervision of the court. As described below, the fallout from that extra-judicial act has had extreme consequences, the result of which makes this case once again ripe for review.

This is now a long-pending case. On May 9, 1989, the petitioners, who are retired employees of the federal government, commenced this class action suit in New York state court on behalf of themselves and all others similarly situated challenging the constitutionality of New York State's and City's discriminatory schemes, seeking, *inter alia,* declaratory and injunctive relief under 42 U.S.C. § 1983 and state law to enjoin the continued enforcement of the State's and City's discriminatory schemes of taxation and seeking, *inter alia,* damages under 42 U.S.C. § 1983 and refunds under state law for the unconstitutionally collected taxes for the years 1986, 1987 and 1988.[2]

By Memorandum Decision dated April 10, 1990, the trial court granted petitioners a declaratory judgment holding that:

(1) The City and State personal income tax scheme which taxed federal pension benefits received prior to January 1, 1989, while exempting from taxation State and local pension benefits, is discriminatory, invalid and unconstitutional in light of *Davis*;

(2) The City and State defendants therefore may not assess and collect personal income taxes on fed-

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[2] In response to this action, the Legislature of the State of New York amended Tax Law § 612(c)(3) and New York City Administrative Code § 11-1712(c)(3) by removing the unconstitutional provision that discriminated against federal retirees. This remedial legislation applies only to tax years 1989 and thereafter.

eral pension benefits received in years 1986 through 1988, which may be still due and owing;

(3) Plaintiffs are entitled to a refund of that portion of their personal income taxes which was paid on federal pension benefits for the years 1986 through 1988, provided that they file for a refund and meet the procedural requirements for a refund under the Tax Law.

See App. C at 28a-29a.[3]

The trial court also granted petitioners a permanent injunction and enjoined respondents from assessing and collecting income taxes on pension benefits which may be due and owing, and further enjoined respondents from "interfering with or refusing to grant plaintiffs a refund of personal income taxes paid on federal pension benefits for the years 1986 through 1988. . . ." The trial court, however, denied petitioners' motion for class certification and granted respondents' summary judgment motion dismissing the first and fourth causes of action for damages under 42 U.S.C. § 1983 and for money had and received, respectively. The order and judgment was entered on June 26, 1990. However, the judgment in favor of the petitioners was automatically stayed pending appeal, thus permitting the continued enforcement of the unconstitutional scheme throughout these proceedings. R2. 424-426, 477, 551.

On appeal and cross appeal, the Second Department reversed the trial court's declarations and injunction. The Second Department concluded that this Court's decision in "*Beam* requires prospective application" of *Davis*. App. B at 9a. The Second Department also affirmed the trial

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[3] Petitioners, on behalf of themselves and all others similarly situated, have satisfied all procedural requirements imposed by the New York Tax Law. See, e.g., R. 514; R2. 639. ("R." refers to Part I of the record on appeal pages 1-536 and "R2." refers to Part II of the record on appeal pages 1-769.).

court's dismissal of the petitioners' claims for damages under 42 U.S.C. § 1983 and its denial of petitioners' motions for, *inter alia,* class certification and for a common fund attorneys' fee award.

Petitioners sought review of the Second Department's decision in *Duffy I* from the New York State Court of Appeals, which review was denied. App. H at 52a; App. I at 54a. Petitioners then sought a writ of certiorari to review the judgment of the Second Department. On June 28, 1993, this Court granted the writ of certiorari, vacated the decision of the Second Department in *Duffy I* and remanded the case for further consideration in light of *Harper.*

While the issues on remand relating to remedies for the federal claims and rights at issue in this case were pending before the Second Department, the State announced that it would pay certain refunds. Because of the effect such a payment would have on the rights and remedies at issue, petitioners sought emergency relief from the Second Department. On July 19, 1994, petitioners were granted a temporary restraining order which, *inter alia,* prevented the State from conditioning acceptance of the refunds in any way and from distributing any more than 80% of the refunds and interest. Argument on a motion for a preliminary injunction was set for September 14, 1994. App. J at 56a.

On August 8, 1994, prior to the scheduled oral argument, and without any prior notice to petitioners, the Second Department issued two Decisions and Orders. The first order determined the appeal on remand by finding that the issue of remedy and potential refunds was "academic" in light of the State's announced intention to provide limited relief to those members of the class that the State now deemed had timely filed for refunds. Specifically relying on its prior decision which was vacated by this Court, the Second Department refused to reexamine the remaining issues. The second order vacated the tempor-

ary restraining order that had been in effect. Together, these two orders are referred to as "*Duffy II*."

The two sentence ruling on the appeal in *Duffy II* was as follows:

> Accordingly, the issues affected by the remittitur by the United States Supreme Court for further consideration in light of *Harper, i.e.*, those relating to the remedy and the potential refunds, are academic. Moreover, the plaintiffs' contentions regarding the remaining issues, including class action certification and common fund attorney's fees, were previously rejected by this Court in *Duffy I*, and need not be reexamined. App. A at 4a.

The decision in *Duffy II* was both in contravention of this Court's mandate and wrong as a matter of law. Accordingly, on August 15, 1994, petitioners filed two motions with the New York State Court of Appeals. One application sought an injunction or a stay of the enforcement of the *Duffy II* orders and the second sought leave to appeal to the New York State Court of Appeals. After a hearing in chambers, Judge Bellacosa of the Court of Appeals granted a temporary stay pending the decision on the motions. (App. K at 58a-59a).

On September 1, 1994, the New York Court of Appeals denied petitioners' motion for leave to appeal and, therefore, vacated the previously entered stay. (App. F at 46a). Also on September 1, 1994, petitioners filed an application with this Court for a stay pending the petition in this case. That application was denied that day by Justice Thomas. (App. L at 60a). The application was renewed to Justice Souter on September 2, 1994, who then referred it to the full Court. That application was denied on September 14, 1994. (App. M at 61a).

REASONS FOR GRANTING THE WRIT

This case is before this Court for a second time as the result of the changing positions of the respondents concerning, *inter alia,* what remedies, if any, are available to petitioners and the putative class in New York. It is but the latest in a long line of cases coming to this Court challenging various states' refusals to provide a clear and certain remedy for the recovery of taxes imposed upon federal retirees in violation of 4 U.S.C. § 111. Since this Court decided *Davis,* this Court has seen 23 petitions from 15 states relating thereto.[4] This Court has granted plenary review in three post-*Davis* cases, and it has yet to follow a state to deny relief for taxes unconstitutionally imposed on federal retirees.[5] Yet, absent review in this case, it is likely that this Court will see several more *Davis*-related

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[4] Arkansas—*Pledger v. Bosnick,* 811 S.W.2d 286 (Ark. 1991), *cert. denied,* 113 S. Ct. 3034, *reh'g denied,* 114 S. Ct. 25 (1993); Arizona—*Estate of Bohn v. Waddell,* 113 S. Ct. 3000, *reh'g denied,* 114 S. Ct. 15 (1993); Colorado—*Colorado v. Kuhn,* 112 S. Ct. 1925 (1992); Georgia—*Reich v. Collins,* 113 S. Ct. 3028 (1993), *cert. denied,* 114 S. Ct. 875 (1994) and *cert. granted in part,* 114 S. Ct. 1048 (1994); Iowa—*McManus v. Iowa,* 112 S. Ct. 84 (1991); Kansas—*Barker v. Kansas,* 112 S. Ct. 1619 (1992); Massachusetts—*Filios v. Commissioner of Revenue,* U.S. No. 93-1145; Missouri—*Missouri Director of Revenue v. Hackman,* 493 U.S. 1019 (1990); Montana—*Sheehy v. Montana Dept. of Revenue,* 113 S. Ct. 3025 (1993); New York—*Duffy v. Wetzler,* 113 S. Ct. 3027 (1993); Oregon—*Nutbrown v. Munn,* 112 S. Ct. 867 (1992); North Carolina—*Swanson v. Powers,* 112 S. Ct. 871 (1992) and *Swanson v. North Carolina,* 441 S.E.2d 537 (N.C. 1994), *petition for cert. filed,* 62 U.S.L.W. 3827 (U.S. May 25, 1994) (No. 93-1882); South Carolina—*Bass v. South Carolina,* 111 S. Ct. 2883 (1991) and 113 S. Ct. 3025 (1993); Virginia—*Harper v. Virginia Dep't of Taxation,* 501 U.S. 1247 (1991) and 113 S. Ct. 2510 (1993) and *Lewy v. Virginia Dep't of Taxation,* 111 S. Ct. 2883 (1991) and 113 S. Ct. 3024 (1993); Wisconsin—*Hogan v. Musolf,* 112 S. Ct. 867 (1992).

[5] *Barker v. Kansas,* 112 S. Ct. 1619 (1992); *Harper v. Virginia Dep't of Taxation,* 113 S. Ct. 2510 (1993); *Reich v. Collins,* 114 S. Ct. 1048 (1994).

petitions as the states assert further "games" like those tolerated below.[6]

The respondents' war of attrition against federal retirees in this case has been waged along lines identical to those advanced by the several states in other *Davis*-related litigation. *See, e.g.,* Brief Amici Curiae of NARFE, et al. in support of petitioners in *Reich v. Collins.* This has been characterized by ever changing positions as to the basis for denying federal retirees a clear and certain remedy for the respondents' violations of federal retirees' federal rights. These changing positions have included:

1. Taxes must be paid first, refunds will be available if *Davis* is retroactive. (May 25, 1989, June 13, 1989). (R. 199,200).

2. Federal retirees could, but need not, apply for refunds in order to be protected. *See* statement by respondents reported in Utica Observer-Dispatch, April 14, 1989.

3. No injunction may be sought because there is a refund right. (June 13, 1989). (R. 314,316).

4. "[There is] not . . . a single case in which New York State refused to refund monies collected pursuant to . . . the personal income tax provision of Article 22, later declared unconstitutional." (Representation by Attorney General of New York State to the United States Court of Appeals for the Third Circuit in *Hardwick v. Cuomo,* 891 F.2d 1097, 1105 (3d Cir. 1989)).

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[6] *See, e.g., Commonwealth of Kentucky Revenue Cabinet, et al. v. Gossum,* Nos. 92-SC-001041-TG, 94-SC-216 TX (Ky., Sept. 1, 1994), (holding that federal retirees are limited to two years of refunds while all other Kentucky taxpayers are entitled to four years); *Bohn v. Waddell, appeal pending,* No. 1 CA-TX, 94-009 (Ariz. Ct. App.) (nullifying this Court's holding in *Harper* by vitiating the final and undisturbed prior judgment in *Bohn,* 807 P.2d 1 (Ariz. Tax 1990), tolling the statute of limitations pending the resolution of the retroactivity of *Davis*).

5. Refunds will not be paid. (May 18, 1990). (R 2. 429).

6. Refunds will be paid if *Davis* is retroactive because New York has waived its common law right to retain unconstitutionally collected taxes. (State Defendants' Appellate Brief in *Duffy I*, October 25, 1990, p.32).

7. Even though *Davis* is retroactive, no refunds will be paid. (Letter from Department of Taxation and Finance to Eugene H. Duffy dated August 31, 1993, Add.3 to Answering Brief and Brief on Remand from United States Supreme Court for Plaintiffs-Respondents-Cross Appellants).

8. New York has not waived its common law right to retain unconstitutionally collected taxes because the refund right of federal retirees was "delimited" by the New York Legislature in 1989. (Brief for Defendants-Appellants Wetzler, Chu and Regan (September 21, 1993)).

9. There is no refund right because an injunction could have been sought. *Id.*

10. Despite this Court's holding in *Harper*, "*Davis v.* Michigan should not be retroactively applied." (Amended Answer of City Defendants dated July 26, 1993 in *Alderman v. Wetzler*).

Thus, this case presents a variation of the states' "heads I win, tails you lose" remedies games in *Davis*-related litigation. Here, with the day of reckoning at hand, with the complicity of the Second Department, the respondents frustrated the mandate of this Court in *Duffy I* by an extra-judicial act in an effort to "buy off" the case, thereby purporting to foreclose without notice and opportunity to be heard the rights of over 20,000 New York federal retirees to the "clear and certain" remedy to which they were entitled.

For the reasons set forth below, petitioners respectfully urge that the Court grant this petition.

I. THE DECISION BELOW FLOUTS THE MANDATE OF THE COURT IN DUFFY I.

This case presents an issue of profound significance which implicates federal constitutional and statutory concerns and is of overwhelming public importance. The issue presented is whether state courts can ignore with impunity the mandates of this Court. This goes to the very heart of our system of federalism.

In *Duffy I*, this Court vacated the decision of the Second Department and ordered its reconsideration in light of *Harper*.[7] Instead, on remand, by its Decision and Order of August 8, 1994, the Second Department refused to reconsider most, if not all, of the issues presented on remand.[8] Indeed, with respect to the very issues presented, the Second Department determined they "need not be reexamined." That decision is completely at odds with the mandate of this Court.

The result is that, absent further intervention of this Court, in New York there will be no "meaningful opportunity" for "relief" sufficient to "satisfy the Due Process

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[7] The questions presented to this Court in *Duffy I* were:

1. Whether 4 U.S.C. § 111 and this Court's decision in *Davis v. Michigan Dep't of Treasury*, 489 U.S. 803 (1989), may under any circumstance be "applied" nonretroactively so as to defeat federal retirees' entitlement to refunds of unconstitutional state taxes imposed upon their federal annuities.
2. Whether an action brought under 42 U.S.C. § 1983 in a state court may be defeated by the assertion of state procedural and substantive defenses, where such defenses would not be available if the action had been brought in a federal forum.

[8] Although it is by no means clear, the Second Department apparently concluded that the only issues potentially affected by *Harper* related to "the remedy and the potential refunds" on plaintiffs' claim for injunctive relief (third cause of action). Even these issues, however, it failed to reconsider as it considered them to be "academic."

Clause of the Fourteenth Amendment" for individual taxpayers to challenge future illegal and unconstitutional taxation, as required by *Harper* and *McKesson Corp. v. Florida Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18 (1990), *on remand*, 574 So. 2d 114 (Fla. 1991). The New York federal retirees in this case, and other New York taxpayers generally, will be most effectively prevented from challenging taxes imposed by New York State or any other taxing authority therein if the decision of the Second Department in *Duffy II* is permitted to remain law. In view of the expense attendant to prosecuting these actions for relatively small claims, federal constitutional and statutory rights will be eliminated in New York for all but the wealthy. The Due Process Clause and Equal Protection Clause of the United States Constitution, Amendment XIV and 42 U.S.C. § 1983 will each be rewritten in New York to protect only "wealthy" persons rather than all persons.

Had the Second Department followed the mandate and reconsidered *Duffy I* in light of *Harper*, a different result would necessarily have been obtained in *Duffy II*. As set forth more fully below, the Second Department's decisions with regard to class action status, the claims under § 1983 and a common fund attorneys' fee award are erroneous in both *Duffy I* and *Duffy II*. In *Duffy I*, however, in part these rulings flowed directly from the Second Department's incorrect holding that *Davis* would not be given retroactive effect and no refunds and similar relief should be awarded. In light of *Harper*, the fundamental premise of the Second Department's rulings in *Duffy I* and, therefore, *Duffy II*, has been eliminated.

In similar circumstances this Court has not countenanced the refusal to abide by or an effort to avoid its mandate. Thus, in *Henry v. City of Rock Hill*, 376 U.S. 776 (1964), the state court's ruling that the case, in light of which this Court directed it to reconsider its decision, was "distinguishable" was rejected. This Court

then held that such authority was controlling and reversed the holding of the state court. *A fortiori,* here the holding of the Second Department should also be rejected as it did not even consider whether *Harper* was "distinguishable" and instead simply refused to reexamine its ruling. *Cf. Deen v. Hickman,* 358 U.S. 57 (1958); *Bucolo v. Adkins,* 424 U.S. 641 (1976) (Supreme Court has power to grant writ of mandamus to compel state court to conform its decision in prior ruling of this Court in a matter on remand.).[9]

The importance of the question presented cannot be exaggerated. State courts simply may not be permitted to ignore, avoid, or otherwise fail to give full and complete effect to the orders of this Court. Absent the granting of this petition, the Second Department will have succeeded in undermining our entire system of justice.

II. THE SECOND DEPARTMENT WAS NOT FREE TO EXTINGUISH PETITIONERS' § 1983 DAMAGES CLAIM AS PART OF THE GAME OF REMEDY ROULETTE.

The decision of the Second Department has far-reaching consequences upon citizens' ability to vindicate federal rights in state courts. Like many of the *Davis*-related cases, it is premised upon the continuing belief of state courts that they are free to flout the mandates of this Court because they refuse to recognize *Davis* as the controlling statement of federal law.[10] Whatever latitude the state courts may have in deciding state law questions, however, no such latitude exists with respect to federal causes of action brought in state courts. *Howlett v. Rose,* 496

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[9] In contrast, in *Cambridge State Bank v. James,* 514 N.W.2d 565, *reh'g denied* (Minn. 1994), *cert. pending,* No. 94-331, on remand from this Court for further consideration in light of *Harper,* the Minnesota Supreme Court properly reexamined its prior decision in its entirety.

[10] *See, e.g., Reich v. Collins,* 114 S. Ct. 1048; *Swanson v. North Carolina,* 441 S.E.2d 537.

U.S. 356, *on remand* 571 So. 2d 29 (Fla. 1990); *Martinez v. California*, 444 U.S. 277, *reh'g denied* 445 U.S. 920 (1980). Here, as part and parcel of the game of remedy roulette, the elements of the federal cause of action were rewritten to permit the respondents to escape liability for injuries compensable under 42 U.S.C § 1983. The result below conflicts with the decisions of the Court and the Arkansas Supreme Court. *See Pledger v. Bosnick*, 811 S.W.2d 286 (Ark. 1991), *cert. denied*, 113 S. Ct. 3034, reh'g denied, 114 S. Ct. 25 (1993).

In view of this Court's mandate, the Second Department's decision on remand stands as a direct challenge to the supremacy of this Court and the integrity of our hierarchical court system. *See Rivers v. Roadway Express, Inc.*, 114 S. Ct. 1510, 1519 (1994). If permitted to stand, the result in this case will be an invitation to the states to eviscerate the holdings of this Court and render the enforcement of federal rights inutile by denying citizens the federal remedy created by Congress under 42 U.S.C. § 1983. Thus, this case presents an ideal companion vehicle to *Reich* for the Court to make unmistakably clear that state courts have the unqualified obligation to recognize the pronouncements of this Court as the "controlling interpretation of federal law." *Harper*, 113 S. Ct. at 2517 (1993).

The refusal of the Second Department to "reexamine" the § 1983 question upon remand from this Court is directly contrary to the express holding of *Harper*:

> When this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule.

Id. In light of *Harper*, the Second Department was obligated to recognize, *inter alia*, this Court's decisions in *Collins v. City of Harker Heights*, 112 S. Ct. 1061 (1992)

and *Hafer v. Melo*, 502 U.S. 21 (1991) as the "controlling statement[s] of federal law," *Harper*, 113 S. Ct. at 2515, in determining upon remand the federal remedy under § 1983 available to petitioners in this case.[11]

The decision below bars the petitioners from asserting their federal rights by engrafting additional elements onto the § 1983 cause of action. Contrary to the actions of the court in the decision below, Congress has not assigned to state courts "a conclusive role in the formative function of defining and characterizing the essential elements of a federal cause of action." *Wilson v. Garcia*, 471 U.S. 261, 269 (1985). The Court has repeatedly held the "elements of, and the defenses to, a federal cause of action are defined by federal law." *Howlett v. Rose*, 496 U.S. 356, 375, *on remand*, 571 So. 2d 29 (Fla. 1990). *See Also Collins v. City of Harker Heights*, 112 S. Ct. 1061 (1992).

Even in the absence of the state remedy games played here, it was erroneous for the courts below to have dismissed the § 1983 damages claim without a trial. Contrary to the decision below, the Court's "cases do not support the [lower court's] reading of § 1983 as requiring an abuse of governmental power separate and apart from the proof of a constitutional violation." *Id.* at 1061, 1065. Similarly, contrary to the pre-*Hafer* holding of the trial court affirmed by the Second Department, the respondents may be held individually liable under § 1983 for acts performed in the course of their official duties. *See Hafer v. Melo*, 502 U.S. 21 (1991).

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[11] Moreover, the result reached by the Second Department upon remand in *Duffy II* is particularly egregious because it violates the important policy interests reaffirmed by the Court just last term in *Elder v. Holloway*, 114 S. Ct. 1019 (1994) that an appellate court must consider all relevant precedents, including those "not presented to or considered by the court of first instance", *id.* at 1021. *A fortiori*, an appellate court must consider controlling, intervening precedent of this Court affirming precedent cited in the first instance to both the trial court and the appellate court.

To the extent that the Second Department's dictum in *Duffy I* may be read to hold that the petitioners' § 1983 claims were alternatively subject to the affirmative defense of qualified immunity, its observation was erroneous. Even without *Harper*, it was indisputable that the City of New York was liable for damages under § 1983. *See Owen v. City of Independence*, 445 U.S. 622, 638, *reh'g denied*, 446 U.S. 993 (1980) ("But there is no tradition of immunity for municipal corporations, and neither history nor policy supports a construction of § 1983 that would justify . . . qualified immunity . . . ."); *American Trucking Associates, Inc. v. Smith*, 496 U.S. 167, 185 (1990) ("In *Owen*, we discerned that according municipalities a special immunity from liability for violations of constitutional rights would not best serve the goals of § 1983 . . . ."). Accordingly, the Second Department's decision "to redefine the federal cause of action," was in direct contravention of its obligation under the Supremacy Clause. *Howlett*, 496 U.S. at 383. Moreover, by failing to "reexamine" the § 1983 damage claim, the Second Department ignored the City's concession on remand that it is not entitled to assert the defense of qualified immunity. (Reply Brief of the City on Remand, November 24, 1993, p. 7).

Similarly, the defense of qualified immunity was *unavailable* to the individually named defendants. The respondent officials in this case failed to carry their "burden of showing that the conduct for which [they sought] immunity would have been privileged at common law in 1871." *Buckley v. Fitzsimmons*, 113 S. Ct. 2606, 2620 (1993) (Scalia, J., concurring) (citations omitted). "Thus, if application of the principle is unclear, the defendant simply loses." *Id.* The Second Department was powerless to create an immunity in contravention of this Court's decisions.[12] At common law in 1871, tax officials

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[12] This issue is one of continuing difficulty for state courts. *See, e.g., Kerr v. Waddell*, 1994 WL 495516 (Ariz. App. 1994) (incorrectly holding that state tax officials enjoy qualified im-

did not enjoy immunity. *See, e.g.*, Plumb, *Tax Refund Suits Against Collectors of Internal Revenue*, 60 Harv. L. Rev. 684 (1947).[13] Contrary to the result below, the Second Department did "not have a license to establish immunities from § 1983 actions in the interests of what [it] judge[d] to be sound public policy." *Tower v. Glover*, 467 U.S. 914, 922-93 (1984). "When, as here, . . . there is no historical tradition of immunity on which we can draw, [the] inquiry is at an end." *Buckley*, 113 S. Ct. at 2618.

As part of the respondents' game of remedy roulette—"heads, I win tails, you lose"—the respondents invoked the state's "governmental operations rule" to defeat class certification.[14] As a consequence, thousands of elderly citizens have been denied the federal damages remedy under § 1983 in this case by a state rule designed to thwart the enforcement of federal rights.[15] To the extent that respondents are correct that some 20,000 federal

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munity even in the absence of any showing of immunity at common law in 1871 and with respect to *post-Davis* enforcement schemes which violate the express terms of 4 U.S.C. § 111). In contrast, federal courts, in the limited cases where they are permitted to entertain state tax cases, appear to have little difficulty in correctly applying the law. *See, e.g., Self-Insurance Institute of America, Inc. v. Korioth*, 1994 WL 466188 (5th Cir. 1994) (holding individual defendants personally liable for sums illegally exacted).

[13] *See also Osborn v. Bank of the United States*, 22 U.S. 738 (1824); *Erskine v. Van Arsdale*, 82 U.S. 75 (1872); *Atchison T. & S.F.R. Co. v. O'Connor*, 223 U.S. 280 (1912).

[14] That rule is that class action certification is inappropriate in a case where governmental actions are involved and subsequent plaintiffs will be adequately protected under the doctrine of *stare decisis*. *Crociata v. State Tax Commission*, 508 N.Y.S.2d 842 (Sup. Ct. 1986), *aff'd*, 535 N.Y.S.2d 592 (App. Div. 1988).

[15] The prerequisites of Fed. R. Civ. P. 23, which are nearly identical to those found in C.P.L.R. 901(a)(1)-(4), all have been satisfied here. App. G at 49a. Defendants claimed that C.P.L.R. 901(a)(5) was not, however, satisfied.

retirees in New York may be denied the state remedy because they have not filed for a refund, nevertheless, state considerations cannot foreclose the § 1983 damages claim here. There is no requirement to seek the state remedy in order to prevail on the § 1983 claim. *See Monroe v. Pape*, 365 U.S. 167, 183 (1961).

The decision below approving a state defense to foreclose a § 1983 class claim is "inconsistent in both purpose and effect with the remedial objectives of the federal civil rights law." *Felder v. Casey*, 487 U.S. 131, 153 (1988). It is contrary to the principles upon which the Court relied in preempting an analogous state notice of claim rule in *Felder* and has conditioned the right to bring a § 1983 class suit "against the very persons and entities Congress intended to subject to liability." *Id. See also Arnold v. Duchesne County*, 26 F.3d 982 (10th Cir. 1994), *cert. filed*, No. 93-358 (Aug. 25, 1994) (invalidating special state limitations statute for § 1983).[16]

Because of the Eleventh Amendment and the Tax Injunction Act, 28 U.S.C. § 1341, taxpayers like petitioners are remitted primarily to state courts to press their claims for § 1983 remedies. But it is state courts that have demonstrated the greatest difficulty in applying the mandates of federal law. Thus, this Court should grant review to protect the principle that state courts can not defeat the federal remedy by resorting to parochial considerations in conflict with the rights established by Congress.

III. PETITIONERS HAVE BEEN DENIED THE MEANINGFUL, BACKWARD-LOOKING RELIEF REQUIRED BY THE CONSTITUTION.

As in *Reich*, *Swanson* and *Beam*, here the machinations of the state and the rulings by its courts resulted in violations of the requirement that a clear and certain

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[16] *See also Garrett v. Bamford*, 538 F.2d 63, 72 (3d Cir. 1976) *cert. denied*, 429 U.S. 977 (1976) ("[A] state [cannot] depend upon burdensome piecemeal review procedures as an effective defense to an allegedly unconstitutional tax structure.").

remedy be provided for infringements of federal rights. *Harper v. Virginia Dep't of Taxation,* 113 S. Ct. 2510 (1993), *McKesson Corp. v. Florida Division of Alcoholic Beverages & Tobacco,* 496 U.S. 18 (1990), *on remand,* 574 So. 2d 114 (Fla. 1991). The Second Department abdicated its responsibility to examine, in the light of *Harper,* whether New York provides an adequate remedy. Instead, it simply endorsed without analysis the inadequate remedy offered by New York and characterized all other issues as "academic" or otherwise not necessary to "reexamine." Accordingly, what is now, according to the Second Department, the sole remedy available in New York, fails to satisfy the requirements of due process.

The net effect of the Second Department ruling is that, in this case and all future cases which challenge the exaction of taxes on federal, constitutional or statutory grounds, unlike in other actions in New York, meritorious claims may be extinguished by the game of remedy roulette and class actions and common fund attorneys' fees will not be permitted. By preventing class certification, the State also prevents notice to members of the class whose federal rights were violated of their rights to seek a refund or other relief. In the absence of that notice, as is the case here, the vast majority of those whose federal rights were violated will not even be aware of the right to seek a remedy and will not, therefore, receive one. In addition, without class actions, each of the many thousands of taxpayers, if they are aware of their rights and if they can afford the expense, will have to bring an individual plenary action in order to vindicate their respective rights.[17] Efforts by the State here to mis-

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[17] *See also Garrett v. Bamford,* 538 F.2d 63 (3d Cir. 1976), *cert. denied,* 429 U.S. 977 (1976) (requiring multiple suits involving identical issues against same defendants constitutes an inadequate remedy); *Weeks v. Bareco Oil Co.,* 125 F.2d 84, 90 (7th Cir. 1941) ("To permit the defendants to contest liability with each claimant in a single, separate suit, would, in many cases give defendants an advantage which would be almost equivalent to

lead taxpayers as to their rights to a refund or other relief, such as those described above, will be effectively countenanced by the courts and, as a result, the statute of limitation may run on individual claims.

The unavailability of a common fund or class action award of attorneys' fees and costs will also impose a dramatic limitation on the availability of any relief. Thus, future class representatives will have a strong disincentive to commencing suit as they will have no mechanism for dividing the costs and expenses of prosecuting such actions. Attorneys will be chilled from representing such clients as, for all practical purposes, few can afford to pay them to proseute individual claims. Only the wealthy will be able to vindicate their federal rights in New York and receive the remedies to which they are entitled by law. Other New Yorkers will have federal rights but no effective remedy.

The conclusion of the Second Department that the issues of class action certification and a common fund attorneys' fee award are not part of the issues concerning the remedy to be ordered conflicts with holdings of this Court, the courts in New York and with common sense. *See Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326 (1980) (class actions and common fund attorneys' fees

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closing the door of justice to all small claimants. This is what we think the class suit practice was to prevent.").

[18] The decision of the Second Department regarding class certification also conflicts with the vast majority of other courts in states with *Davis* related liitgation, all of which are final. *See, e.g., Barker v. Kansas*, 112 S. Ct. 1619 (1992) (Kansas); *Kuhn v. State Dep't of Revenue*, 817 P.2d 101 (Colo. 1991), *cert. dismissed*, 112 S. Ct. 1925 (1992); *Burns v. State of N.M.*, No. SF 89-1314(c) (Santa Fe County, N.M.); *Sizemore v. Rinehart*, 611 So. 2d 1064 (Ala. Civ. App. 1992), *writ quashed as improvidently granted, Ex parte Sizemore*, 611 So. 2d 1069 (Ala. 1993). *Bryde v. State of Mich. Dep't of Treasury*, No. 89-12513-CM (Mich. Ct. Cl. 1992); *Pledger v. Bosnick*, 811 S.W.2d 286 (Ark. 1991), *cert. denied*, 113 S. Ct. 3034, *reh'g denied*, 114 S. Ct. 25 (1993); *Brum-*

necessary to provide effective remedy for the breach of certain federal rights).[18] The failure to consider these aspects of the remedy for the constitutional violations in this case, and the indication that such aspects of remedy need not be considered in future cases, conflicts with the due process requirement imposed upon states by the United States Constitution, Amendment XIV and the consistent rulings of this Court. *See, e.g., McKesson Corp. v. Florida Division of Alcoholic Beverages & Tobacco,* 496 U.S. 18 (1990), *on remand,* 574 So. 2d 114 (Fla. 1991)

The ruling of the Second Department also directly conflicts wtih this Court's holding in *Deposit Guaranty.* The voluntary payment by the State to named plaintiffs in their individual capacities over their objections would not render the appeal of the denial of class action certification "academic." The Court held:

> A . . . court's ruling on the certification issue is often the most significant decision rendered in these class-action proceedings. To deny the right to appeal simply because the defendant has sought to 'buy off' the individual private claims of the named plaintiffs would be contrary to sound judicial administration.

Deposit Guaranty, 445 U.S. at 339. The "individual" interests of named plaintiffs in the litigation, which includes seeking an allocation of costs to those who benefit from a recovery, is sufficient to permit an appeal of the adverse certification ruling. *Id.* at 340.

By imposing the parochial defense of the governmental operations rule to prevent class action certification, New York extinguished a federal right.[19] *See Felder v. Casey,*

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ley v. Utah State Tax Comm'n, 868 P.2d 796 (Utah 1994); *Bass v. South Carolina,* 414 S.E.2d 110 (S.C. 1992), *vacated and remanded,* 113 S. Ct. 3025 (1993); *Ponthier v. Tarver,* No. 23396 order (La. Bd. Tax. App. May 4, 1992).

[19] The Second Department ruling also conflicts with New York law regarding the imposition of these defenses. *See Bryant Avenue*

487 U.S. 131, 147 (1988). Thus, the due process rights of plaintiffs to share the financial burden in prosecuting this claim pursuant to the class action statute have been eliminated. The discretionary state rule applied to insulate the State and its officials from liability may not take precedence over a federal right. *See also Howlett v. Rose,* 496 U.S. 356 (1990). "The Supremacy Clause makes those laws 'the supreme Law of the Land'. . .". *Id.* at 367. Similarly, the due process rights of plaintiffs were violated by the extinguishment of the common fund attorneys' fee remedy. *Brinkerhoff-Faris Trust & Sav. Co. v. Hill,* 281 U.S. 673 (1930). The court failed to consider this alternative method of sharing plaintiff's financial burden, a settled remedy available under New York law.

Finally, policy reasons also warrant the granting of this petition for a writ of certiorari. Absent a review by this Court, petitioners and the other retainer clients of petitioners' counsel will be forced to bear the entire costs associated with this litigation. Petitioners' counsel will not receive any common fund or class action attorneys' fee. Most of the federal retirees in New York who were unconstitutionally taxed in this instance, estimated to be approximately 20,000 of the 30,000 who were so taxed, will receive no recovery either in the way of a tax refund, damage award pursuant to 42 U.S.C. § 1983 or otherwise. Future challenges to unconstitutional exactions in New York State will be effectively precluded except for the wealthy. Average individual taxpayers will not be able to afford to bring such challenges. Attorneys will not be able to afford to represent taxpayers in such challenges. *See e.g.,* Podgers, *Chasing the Ideal,* 80 A.B.A.J. 56 (1994). New York State, its officials and indeed

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***Tenants' Assoc. v. Koch,* 522 N.E.2d 1041 (N.Y. 1988) (presence of governmental defendants in an action does not preclude class certification). *See also City of Rochester v. Chiarella,* 479 N.E.2d 810 (N.Y. 1985), *Dudley v. Kerwick,* 444 N.Y.S.2d 965 (App. Div. 1981) (class actions permitted in New York in actions involving the recovery of taxes.).**

officials from all states will effectively have impunity for violations of the federal rights of the average citizen. This Court should grant this petition to address this important issue of demonstrated difficulty for the states.

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari to the Supreme Court of the State of New York, Appellate Division, Second Judicial Department, should be granted.

Respectfully submitted,

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Dated: October 26, 1994

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APPENDIX A

SUPREME COURT OF THE
STATE OF NEW YORK
APPELLATE DIVISION
SECOND JUDICIAL DEPARTMENT

Argued—May 21, 1991

WILLIAM C. THOMPSON, J.P.
SONDRA MILLER
CORNELIUS J. O'BRIEN
MYRIAM J. ALTMAN, JJ.

90-07800
91-02056
91-02059
91-02060
91-02061

EUGENE H. DUFFY, *et al.*,
respondents-appellants,

v.

JAMES W. WETZLER, *et al.*,
appellants-respondents.

DECISION & ORDER

In an action, *inter alia*, for declaratory and injunctive relief challenging the constitutionality of former Tax Law § 612(c)(3) and Administrative Code of the City of New York former § 11-1712(c)(3), the defendants ap-

peal from so much of an order and judgment (one paper) of the Supreme Court, Queens County (Le Vine, J.), dated June 14, 1990, as declared the challenged laws invalid and unconstitutional, and enjoined them from assessing or collecting personal income taxes which may still be due and owing, and from interfering with or refusing to grant the plaintiffs a refund of taxes paid on Federal pension benefits for the years 1986 through 1988, and the plaintiffs (1) cross-appeal from so much of the same order and judgment as, upon renewal, denied their motion for class certification, and dismissed the first cause of action asserted under 42 USC § 1983, and the fourth cause of action asserted against the defendant City of New York for money had and received (*Duffy v Wetzler,* 148 Misc 2d 459), and (2) appeal from four orders of the same court, all entered October 5, 1990, which denied their motions (i) for leave to renew or reargue their application for class certification and for resettlement of the judgment, (ii) to supplement their pleadings, (iii) to permit the intervention of various taxpayers, and (iv) for an award of attorneys' fees to the plaintiffs' counsel under the common fund doctrine. By opinion and order of this court dated January 15, 1992 (*Duffy v Wetzler,* 174 AD2d 253), the order and judgment appealed from was modified in certain respects by deleting, *inter alia,* those provisions which declared that the plaintiffs were entitled to refunds, and which granted injunctive relief accordingly, and the orders were affirmed. On a writ of certiorari to this court, the Supreme Court of the United States vacated the opinion and order of this court dated January 15, 1992, and remitted the matter here "for further consideration in light of *Harper v Virginia Department of Taxation,* 509 U.S. ——, 113 S. Ct. 2510, —— L. Ed. 2d —— (1993)" (*Duffy v Wetzler,* —— US ——, 113 S Ct 3027, 3028). Justice Altman has been submitted for former Justice Kunzeman (*see,* 22 NYCRR 670.1[c]).

ORDERED that the appeal from the order and judgment of the Supreme Court, Queens County, dated June

14, 1990, is dismissed, without costs or disbursements, as academic; and it is further,

ORDERED that the order and judgment is affirmed insofar as cross-appealed from, without costs or disbursements; and it is further,

ORDERED that the orders are affirmed insofar as appealed from, without costs or disbursements.

In *Duffy v Wetzler* (174 AD2d 253, *supra*) (hereinafter *Duffy I*), this court addressed the issue of whether the decision of the United States Supreme Court in *Davis v Michigan* (489 US 803) should be applied retroactively. In *Davis,* the Supreme Court of the United States invalidated, as violative of principles of intergovernmental tax immunity, Michigan's income taxation scheme which exempted from taxation pensions paid to former state employees but taxed the pensions paid to all other retirees, including those of the Federal government. The tax laws existing in this State and the City of New York at the time of the *Davis* decision were similarly discriminatory (*see,* Tax Law § 612[c][3]; Administrative Code of the City of New York § 11-1712), and were subsequently amended to exempt pensions paid to Federal retirees from taxation by the State and City (L 1989, ch. 664, §§ 1, 2, 3). The plaintiffs, Federal retirees, sought to secure refunds of the illegally imposed taxes for the period provided by statute (*see,* Tax Law § 687[a]), asserting that the *Davis* decision should be applied retroactively.

This court, in *Duffy I* (*supra,* at 259-265), reasoned that the Supreme Court's plurality decision in *James B. Beam Distilling Co. v Georgia,* (501 US ——, 111 S Ct 2439), which proscribed the use of selective prospectivity, did not preclude the application of *Davis* on a purely prospective basis. This court concluded that the appropriate analysis of the prospectivity issue was governed by *Chevron Oil v Huson* (404 US 97), and that application of the three-pronged *Chevron Oil* test required that *Davis* be given only prospective effect.

The United States Supreme Court subsequently granted the plaintiffs' petition for certiorari, vacated the opinion and order of this court in *Duffy I*, and remitted the matter here for further consideration in light of *Harper v Virginia Dept. of Taxation* (509 US ——, 113 S Ct 2510). In *Harper*, the Supreme Court ruled that its 1989 determination invalidating state laws taxing Federal pensions but not those of former state employees must be applied retroactively as a matter of Federal law. However, on the issue of remedy, the court further held that Federal due process did not necessarily mandate refunds of the illegal taxes so imposed if state law provided an adequate form of "predeprivation process", as, for example, by allowing taxpayers to bring suit to enjoin imposition of a tax prior to its payment (*Harper v Virginia Dept. of Taxation, supra,* at 2519-2520).

The State of New York decided to "pay full refunds plus interest to the approximately 10,000 federal retirees who paid State income taxes on their federal pensions prior to 1989 pursuant to tax provisions that were later held to be unconstitutional under *Davis* [and] * * * *Harper* * * * and who have filed timely administrative claims for refunds for those taxes with the Department of Taxation and Finance", and notified this court of that decision in a letter dated June 29, 1994. The City of New York has acquiesced in this decision.

Accordingly, the issues affected by the remittitur by the United States Supreme Court for further consideration in light of *Harper, i.e.*, those relating to the remedy and the potential refunds, are academic. Moreover, the plaintiffs' contentions regarding the remaining issues, including class action certification and common fund attorneys' fees, were previously rejected by this court in *Duffy I*, and need not be reexamined.

THOMPSON, J.P., MILLER, O'BRIEN and ALTMAN, JJ., concur.

GUY JAMES MANGANO, P.J.
WILLIAM C. THOMPSON
SONDRA MILLER
CORNELIUS J. O'BRIEN
MYRIAM J. ALTMAN, JJ.

90-07800
91-02056
91-02059
91-02060
91-02061

EUGENE H. DUFFY, *et al.*,
respondents-appellants,

v.

JAMES W. WETZLER, *et al.*,
appellants-respondents.

DECISION & ORDER ON MOTION

On the court's own motion, it is,

ORDERED that the decision and order on motion of this court, dated July 19, 1994, is recalled and vacated and the following decision and order on motion is substituted therefor:

Motion by Anderson Kill Olick & Oshinsky, P.C., the co-counsel of the plaintiffs, to enjoin the defendants from making any distribution to members of the putative class that is conditional in any way or seeks a release or any other compromise in return for such payments, from distributing to the plaintiffs and members of the putative class amounts greater than 80% of their respective claim for

refunds for taxes illegally assessed on Federal pensions, including interest thereon, from otherwise interfering with the lien held by Anderson Kill Olick & Oshinsky, P.C., Phelan & Costello, P.C., and O'Neil Cannon & Hollman, S.C., on the proceeds of the refunds and interest, and from otherwise breaching the fiduciary duties they hold as trustees of a constructive trust of the common fund in this action.

Upon the papers submitted in support of the motion and the papers submitted in opposition thereto, it is

ORDERED that so much of the motion as refers to the distribution to the plaintiff clients is referred to the Supreme Court, Queens County (Le Vine, J.), for hearing and determination, and the motion is otherwise denied; and it is further,

ORDERED that the Supreme Court, Queens County, shall set the matter down for an immediate hearing, limited solely to the issue of whether the attorneys have a right to a charging lien pursuant to Judiciary Law § 475, against the refunds to be paid to the plaintiff clients and if so, the amount of the lien; and it is further,

ORDERED that pending hearing and determination of the motion, the defendants are enjoined from making any distribution to the plaintiff clients in an amount greater than 80% of their respective claim for refunds for taxes illegally assessed on Federal pensions, including interest thereon, provided that the attorneys submit a list of their clients' names to the Attorney-General within 5 days after service upon them of a copy of this decision and order on motion, with notice of entry.

MANGANO, P.J., THOMPSON, MILLER, O'BRIEN, and ALTMAN, JJ., concur.

ENTER:

MARTIN H. BROWNSTEIN
Clerk

APPENDIX B

SUPREME COURT OF THE
STATE OF NEW YORK
APPELLATE DIVISION
SECOND JUDICIAL DEPARTMENT

Argued—May 21, 1991

WILLIAM C. THOMPSON, J.P.
JOSEPH J. KUNZEMAN
SONDRA MILLER
CORNELIUS J. O'BRIEN, JJ.

90-07800
91-02056
91-02059
91-02060
91-02061

EUGENE H. DUFFY, *et al.*,
Respondents-Appellants,

ALBERT ENGEL, *et al.*,
Proposed Plaintiffs-Intervenors-Appellants,

v.

JAMES W. WETZLER, ETC., *et al.*,
Appellants-Respondents.

OPINION & ORDER

APPEALS by the defendants James W. Wetzler, Roderick G.W. Chu, and Edward V. Regan, and by the defendants Anthony Shorris, Stanley E. Grayson, Abraham Biderman, Paul Crotty, and the City of New York, in an action, *inter alia,* for declaratory and injunctive relief challenging the constitutionality of former Tax Law § 612(c)(3) and Administrative Code of the City of New York former § 11-1712(c)(3), from so much of an order and judgment (one paper) of the Supreme Court (Alan Le Vine, J.), dated June 14, 1990, and entered in Queens County, as declared the challenged laws invalid and unconstitutional, and enjoined the defendants from assessing or collecting personal income taxes which may still be due and owing, and from interfering with or refusing to grant the plaintiffs a refund of taxes paid on Federal pension benefits for the years 1986 through 1988, CROSS APPEAL by the plaintiffs from so much of the same order and judgment as, upon renewal, denied their motion for class certification, and dismissed the first cause of action asserted under 42 USC § 1983, and the fourth cause of action asserted against the defendant City of New York for money had and received (*Duffy v. Wetzler,* 148 Misc 2d 459), and APPEALS by the plaintiffs from four orders of the same court, all entered October 5, 1990, which denied their motions (i) for leave to renew or reargue their application for class certification and for resettlement of the judgment, (ii) to supplement their pleadings, (iii) to permit the intervention of various taxpayers, and (iv) for an award of attorneys' fees to plaintiffs' counsel under the common fund doctrine.

Robert Abrams, Attorney-General, Albany, N.Y. (Peter H. Schiff and Denise A. Hartman of counsel), for appellants-respondents James W. Wetzler and Roderick G.W. Chu, individually and as present or former New York State Commissioner of Taxation and Finance, and Edward V. Regan, individually and as Comptroller of the State of New York.

O. Peter Sherwood, Corporation Counsel, New York, N.Y. (Edward F.X. Hart, Stanley Buchsbaum, Frances J. Henn, and Edith I. Spivack of counsel), for appellants-respondents Anthony Shorris, Stanley E. Grayson, Abraham Biderman, and Paul Crotty, individually and as present or former Commissioner of Finance of the City of New York, and the City of New York.

Anderson Kill Olick & Oshinsky, P.C., New York, N.Y. (Rudolph W. Giuliani, Mark L. Weyman, and Roberto Velez of counsel), Phelan & Costello, P.C., New York, N.Y. (John J. Phelan III, Robert J. Costello, and Michael F. Fitzgerald of counsel), and O'Neil, Cannon & Hollman, S.C., Milwaukee, Wisconsin (Eugene O. Duffy and Gregory W. Lyons of counsel), for respondents-appellants and proposed plaintiffs-intervenors-respondents-appellants. (one brief filed)

THOMPSON, J. P.

The main issue arising at bar is whether the decision in the instant case should be applied retroactively, or prospectively, pursuant to the recent decision of the United States Supreme Court in *James B. Beam Distilling Co. v. Georgia* (—— US ——, 111 S Ct 2439 [hereinafter Beam]). We conclude that an analysis of *Beam* requires prospective application on the facts. For the reasons which follow therefore, we modify the order and judgment from which the first appeal ensues, and affirm the orders appealed from.

I

The plaintiffs commenced this action on May 9, 1989, on behalf of themselves and purportedly all Federal retirees similarly situated, seeking a declaratory judgment, a permanent injunction, and damages as a result of the United States Supreme Court decision on March 28, 1989, in *Davis v Michigan Department of Treasury* (489 US 803 [hereinafter *Davis*]). In that case the Supreme Court invalidated, as unconstitutional, Michigan's tax

scheme which exempted from taxation pensions paid to former State employees but taxed the pensions paid to all other retirees, including those of the Federal government. *Davis' ratio decidendi* was predicated on a construction of 4 USC § 111, which provides, in pertinent part, that the Federal government consents to the taxation of its officers or employees "by a duly constituted taxing authority having jurisdiction, *if the taxation does not discriminate against the officer or employee because of the source of pay or compensation*" (emphasis added). The *Davis* court held that 4 USC § 111 applied to both retirement and ordinary income, and it found discrimination, and a violation of the principles of intergovernmental tax immunity in Michigan's exemption of State retiree pensions. While it will be more relevant later, it bears noting at this juncture that *Davis* never *decided* the point regarding prospectivity or retroactivity, and therefore made no determination as to refunds of those taxes which had been unconstitutionally assessed and collected.

Interestingly enough, at the time of the *Davis* decision, at least 19 states, including New York, had tax or pension statutes that included exemptions similar to Michigan's. Not surprisingly, *Davis* spawned a mass of litigation in many states on behalf of Federal retirees seeking, as do the plaintiffs at bar, an adjudication of the constitutionality of such statutes and/or refunds of taxes paid.

In 1920, both the Greater New York Charter and the New York Civil Service Law were amended to render exempt from State and municipal taxes the pensions of officers and employees of the State and City (*see*, L 1920, ch 427, ch 741). In 1939, a similar provision was incorporated into the New York Constitution as article XVI, § 5 which provides that "[a]ll salaries, wages and other compensation, *except pensions*, paid to officers and employees of the State and its subdivisions and agencies shall be subject to taxation" (emphasis added). This provision was also legislated into Tax Law § 612(c)(3), one of the statutes at issue, "subtract[ing] from federal

adjusted gross income * * * [p]ensions to officers and employees of this State." Also in 1939, in response to *Graves v People ex rel. O'Keefe* (306 US 466) and the Public Salary Tax Act of that year (4 USC § 111), New York first began to tax the compensation paid to Federal employees (*see,* L 1939, ch. 619; codified as Tax Law § 359[6] and later repealed by L 1987, ch 267). For the first time in 1966, the City adopted a personal income tax containing an identical exemption for State and City pensions (*see,* New York City Administrative Code, § T46-112[c][3]; L 1966 ch 773, § 12[c]). In 1981, the State Legislature added a section to both the State and City personal income taxes which exempted from taxation pension benefits of all kinds up to the first $20,000 for any retirees over the age of 59½ (Tax Law § 612[c][3-a]; Administrative Code, § 11-1712[c][3-a]). At the crux of the instant action is the taxation of pension benefits of Federal retirees above this first $20,000, and of the total pension benefits of all Federal retirees under the age of 59½.

Soon after the *Davis* decision, and prior to this action, efforts were made to conform the State and City taxing schemes to *Davis.* On July 21, 1989, the Legislature amended Tax Law § 612(c)(3) and § 11-1712 of the Administrative Code to place pensions paid to Federal retirees in the same position as pensions of State retirees. The Legislature declared that the amendment was to take effect "immediately and shall apply to federal pension benefits received in taxable years beginning on or after January 1, 1989" (L 1989, ch 664, §§ 3; L 1989, ch 664, §§ 1, 2).

The plaintiffs' second amended complaint, served on December 23, 1989, set forth four causes of action. The first alleged a violation of 42 USC § 1983 and sought damages against the defendant Wetzler, the current Commissioner of Taxation and Finance of the State, and various current and former functionaries in the State and

City finance departments. The plaintiffs alleged that in enforcing the impugned Tax Law and Administrative Code, these defendants violated the plaintiffs' right guaranteed under 4 USC § 111 (principles of intergovernmental tax immunity), US Constitution, article VI, § 2, and the due process and equal protection clauses of the United States Constitution. The second cause of action sought a declaration that Tax Law § 612(c)(3) and New York City Administrative Code § 11-1712(c)(3) were unconstitutional. It also sought a refund for the years 1986 through 1989 and asked that those refund rights not be qualified by permitting only prospective application of the decision. In the third cause of action, the plaintiffs sought an injunction against the State and City defendants preventing them from collecting taxes on Federal pensions for the years 1986 through 1989; and to set up a trust fund for repayment of such allegedly unlawfully collected taxes. The fourth cause of action sought a refund from the City for money had and received. The second amended complaint also sought class certification and class attorneys' fees. After service of their answers, the State and City defendants moved for summary judgment on the ground that *Davis* applied prospectively only, since it was completely unforeseeable.

The Supreme Court (Le Vine, J.), *inter alia,* determined that the plaintiffs were entitled to refunds and enjoined the defendants from collecting the taxes as described therein for the period 1986 through 1988 (*Duffy v. Wetzler,* 148 Misc 2d 459). The court reasoned that the *Davis* decision mandated a declaration that "the City and State personal income tax scheme which taxed Federal pension benefits * * * while exempting State and local pension benefits, [was] discriminatory, invalid and unconstitutional" (*Duffy v Wetzler, supra,* at 470). It observed that the 1989 amendments to the Tax Law and the Administrative Code were prospective only. "Thus, Federal Pension benefits received in years prior to 1989 remain[ed] subject to taxation and collection to the extent that the Statute of Limitation applie[d]" (*Duffy v Wetz-*

ler, supra, at 465). The court found that there was no need to determine "whether *Davis* * * * should have prospective or retroactive application, as the question of entitlement, method and extent of a tax refund is governed by New York's Tax Law" (*Duffy v Wetzler, supra,* at 466). It referred to Tax Law § 687(a), which provided, in pertinent part, that a claim for a credit or an overpayment of income tax must be filed within the later of two periods, either three years from the date of filing of the return or two years from the date of payment of the tax. The court in *Duffy* found that although "overpayment" was not defined in the Tax Law, a reference to Federal income tax law, as well as Supreme Court decisions, yielded the concluded "that overpayments arising out of the payment of a tax later held to be unconstitutional are recoverable in the same manner as other overpayments, provided that a timely claim is filed" (*Duffy v Wetzler, supra,* at 466). We disagree.

II

Central to the issue of tax refunds is the prior determination of the prospectivity versus retroactivity question. In our view, the court's opinion that a reference to Tax Law § 687(a) resolves the matter is a non sequitur, ignoring, as it does, the point, argued by the defendants, that there would be no "overpayment" if *Davis* is given prospective effect only. Moreover, none of the Supreme Court decisions cited by the court involved the issue of prospectivity/retroactivity (*see, e.g., Jones v Liberty Glass Co.,* 332 US 524; *Kavanagh v Noble,* 332 US 535). Hence, before a discussion of the proper construction of the term "overpayment" is reached, a determination of the prospectivity/retroactivity problem must be made. Prior to the recent decision of the United States Supreme Court in *Beam* (*supra*), the leading case on this issue was *Chevron Oil Co. v Huson* (404 US 97). In that case, the Supreme Court set forth, in the following language, the criteria for a prospective application of a decision:

> "First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied * * * or by deciding an issue of first impression whose resolution was not clearly foreshadowed * * * Second, it has been stressed that 'we must * * * weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation' * * * Finally, we have weighed the inequity imposed by retroactive application, for '[w]here a decision of this Court could produce substantial inequitable results if applied retroactively, there is ample basis in our cases for avoiding the "injustice or hardship" by a holding of nonretroactivity' " (*Chevron Oil Co. v. Huson, supra,* at 106-107).

An ancillary question at bar, therefore, is the extent to which the *Chevron Oil* case is still a valid precedent. For an answer to this, we turn to an analysis of *Beam.*

In *Beam,* the facts were that Georgia State law, prior to its amendment in 1985, had imposed an excise tax on imported alcohol and distilled spirits at a rate double that imposed on alcohol and distilled spirits manufactured from Georgia-grown products. In 1984, a Hawaii statute that similarly distinguished between imported and local alcoholic products was held, in *Bacchus Imports, Ltd. v. Dias* (468 US 263), to be violative of the Commerce Clause. Following *Bacchus,* the petitioner, a Delaware corporation and Kentucky bourbon manufacturer, claimed Georgia's law to be similarly inconsistent with the Commerce Clause and sought a refund of $2,400,000 representing the full amount of excise taxes paid for the years 1982, 1983, and 1984. The trial court and the Supreme Court of Georgia held that the pre-1985 version of the statute violated the Commerce Clause but applied that finding on a prospective basis only, in the sense that it declined to declare the State's application of the stat-

ute unconstitutional for the years in question. The Georgia Supreme Court Court relied on *Chevron Oil Co. v Huson* (*supra*), and concluded that, but for *Bacchus*, its decision on the constitutional question would have established a new rule of law by overruling past precedent.

The United States Supreme Court reversed and remitted the matter for further proceedings. The decision was, however, by plurality, with one main opinion delivered by Justice Souter (concurred in by Justice Stevens), three separate concurrences, and a dissent. Justice Souter's opinion commenced with the observation that "[s]ince the question is whether the court should apply the old rule or the new one, retroactivity is properly seen in the first instance as a matter of choice of law, 'a choice * * * between the principle of forward operation and that of relation backward' " (*James B. Beam Distilling Co. v Georgia*, —— US ——, 111 S Ct 2439, 2443, *supra*). Once a rule is found to apply retroactively there may then be a further issue of remedies, i.e., whether the party prevailing under a new rule should obtain the same relief that would have been awarded if the rule had been an old one. "Subject to possible constitutional thresholds * * * the remedial inquiry is one governed by state law, at least where the case originates in state court * * * But the antecedent choice-of-law question is a federal one where the rule at issue itself derives from federal law, constitutional or otherwise" (*James P. Beam Distilling Co. v Georgia, supra*, at 2443).

As enumerated in *Beam*, there were three ways in which the choice of law problem might be resolved. The first was full retroactivity, applying the decision both to the parties before the court and to all others similarly situated, consistent with res judicata and procedural barriers such as Statutes of Limitation. This practice is "overwhelmingly the norm" but attracted the criticism that "[it] [fails] to take account of reliance on cases subsequently abandoned, a fact of life if not always one of

jurisprudential recognition" (*James B. Beam Distilling Co. v Georgia, supra,* at 2443). The second choice of law resolution was "the purely prospective method of overruling, under which a new rule is applied neither to the parties in the law-making decision nor to those others against or by whom it might be applied to conduct or events occurring before that decision. The case is decided under the old law but becomes a vehicle for announcing the new, effective with respect to all conduct occurring after the date of that decision" (*James B. Beam Distilling Co. v Georgia, supra,* at 2443). This method, however, had the drawback that it tended to relax the force of precedent, by minimizing the costs of overruling and thereby allowing the courts to act with a freedom comparable to that of legislatures. The Justice noted that the court had, "albeit infrequently, restored to pure prospectivity" (*James B. Beam Distilling Co. v. Georgia, supra* [*quoting Chevron Oil Co. v Huson,* 404 US 97]). Finally, the court might utilize "modified or selective, prospectivity," that is, it might apply a new rule to the case in which it was enunciated but return to the old rule with respect to all other cases arising on facts predating the decision (*James B. Beam Distilling Co. v Georgia, supra,* at 2444). The weakness of selective prospectivity was its breach of "the principle that litigants in similar situations should be treated the same, a fundamental component of stare decisis and the rule of law generally" (*James B. Beam Distilling Co. v Georgia, supra,* at 2444). Remarking that *Bacchus* had applied its own rule retroactively, Justice Souter held that it was error to refuse to apply a rule of Federal law retroactively after the case announcing the rule had already done so. He noted that "principles of equality and stare decisis here [prevailed] over any claim based on a *Chevron Oil* analysis" (*James B. Beam Distilling Co. v Georgia, supra,* at 2446).

Justice Souter's opinion did not purport to overrule *Chevron Oil.* He noted that litigants could not be distinguished for choice-of-law purposes on the particular

equities of their claims to prospectivity, that is, whether they actually relied on the old rule and how they would suffer from retroactive application of the new. He added that to that extent, the decision did limit the possible applications of the *Chevron Oil* analysis. "Because the rejection of modified prospectivity precludes retroactive application of a new rule to some litigants when it is not applied to others, the *Chevron Oil* test cannot determine the choice of law by relying on the equities of the particular case" (*James B. Beam Distilling Co. v. Georgia, supra,* at 2447). The Justice added that once retroactive application had been chosen for any assertedly new rule, it was chosen for all others who might seek its prospective application. "The applicability of rules of law are not to be switched on and off according to individual hardship" (*James B. Beam Distilling Co. v. Georgia, supra,* at 2448). In the final paragraphs of his opinion, Justice Souter noted that the grounds of the Court's decision were narrow, confined entirely to an issue of choice-of-law namely, "[w]hen the Court has applied a rule of law to the litigants in one case, it must do so with respect to all others not barred by procedural requirements or res judicata. *We do not speculate as to the bounds or propriety of pure prospectivity*" (*James B. Beam Distilling Co. v. Georgia, supra,* at 2448 [emphasis added]).

Justice White concurred with the retroactivity analysis. However, he departed from the main opinion by supporting *Chevron Oil.* He stated that retroactivity could be utilized either on the theory that the new decision was "reasonably foreseeable" and hence "not a new rule" (thus not implicating *Chevron Oil*) or on the view that the *Chevron Oil* factors would support a retroactive application (*James B. Beam Distilling Co. v Georgia, supra,* at 2448). He, however, perceived "no precedent in civil cases applying a new rule to the parties in the case but not to other similarly situated" (that is, selective or modified prospectivity) (*James B. Beam Distilling Co. v Georgia, supra,* at 2448). The Justice, however, strongly sup-

ported the pure prospectivity theory. He said that "nothing in the above, however, is meant to suggest that I retreat from those opinions filed in this Court which I wrote or joined holding or recognizing that in proper cases a new rule announced by the Court will not be applied retroactively, even to the parties before the Court * * * [n]or, *without overruling Chevron Oil and those other cases before and after Chevron Oil,* holding that certain decisions will be applied prospectively only, can anyone sensibly insist on automatic retroactivity for any and all judicial decisions in the federal system * * * *The propriety of prospective application of decision in this Court, in both Constitutional and statutory cases, is settled by our prior decisions*" (*James B. Beam Distilling Co. v Georgia, supra,* at 2448-2449 [emphasis added]). Justice Scalia, with whom Justices Marshall and Blackmun joined, agreed "as an abstract matter" with Justice Souter's reasoning. However, he thought both selective prospectivity and pure prospectivity to be constitutionally impermissible since they infringed on the concept of "the judicial power as understood by our common law tradition" (*James B. Beam Distilling Co. v Georgia, supra,* at 2450). Justice Blackmun, with whom Justices Marshall and Scalia joined, thought "that prospectivity, whether 'selective' or 'pure' breaches our obligation to discharge our constitutional function" (*James B. Beam Distilling Co. v Georgia, supra,* at 2450).

The dissent (Justice O'Connor, joined by the Chief Justice and Justice Kennedy) criticized the majority's attempt to sidestep *Chevron Oil,* which "describes our long-established procedure for making this inquiry" (*James B. Beam Distilling Co. v Georgia, supra,* at 2451). Turning to Justice Souter's use of equality and stare decisis, Justice O'Connor observed that neither of these two concepts, without a consideration of *Chevron Oil,* led to the view that once a decision was applied retroactively in the case at issue, it had to be applied retroactively to everyone. As to equality, *Chevron Oil's* purpose was to

determine the equities of the case, and stare decisis cut exactly the other way by "allow[ing] those affected by the law to order their affairs without fear that the established law upon which they rely will suddenly be pulled out from under them" (*James B. Beam Distilling Co. v Georgia, supra,* at 2452). Justice Scalia concurred by stating that "imposition of retroactive liability on a litigant would *upset that litigant's settled expectations* because the earlier decision for which stare decisis effect is claimed * * * overruled prior law. That would turn the doctrine of stare decisis against the very purpose for which it exists" (*James B. Beam Distilling Co. v Georgia, supra,* at 2452). Utilizing a *Chevron Oil* analysis, Justice O'Connor concluded that the *Bacchus* case should not have been applied retroactively. It established a new rule ("*Bacchus*' rule * * * came out of the blue") (*James B. Beam Distilling Co. v Georgia, supra,* at 2455). And as regards the equities, the Justice stated that "the legitimate expectation of James Beam and other liquor manufacturers was that they had to pay the tax here at issue and that it was constitutional. They made their business decisions accordingly. There is little hardship to these companies from not receiving a tax refund they had no reason to anticipate" (*James B. Beam Distilling Co. v Georgia, supra,* at 2455). Finally, Justice O'Connor stated that the court had perverted the meaning of the terms "equality" and "stare decisis" on which it purported to base its retroactivity analysis (*James B. Beam Distilling Co. v Georgia, supra,* at 2450).

It goes without saying that *Beam* is not susceptible to easy explanation and requires the unsalutary procedure, as in all plurality decisions, of a judicial head-count. However, two points appear clear beyond equivocation. First, none of the opinions suggests that *Chevron Oil* has been overruled. Indeed, there appears to be a plurality (Justices White, Stevens, Souter, and the three dissenters) who support pure prospectivity as enunciated in *Chevron Oil*. What separated the two camps was the issue whether

or not it applied in *Beam* itself (Justices Marshall, Blackmun, and Scalia appear hostile to prospectivity in any form). Second, *Beam* is, as Justice Souter noted, a narrow decision, committed only to the removal of the doctrine of modified or selective prospectivity from this area of the doctrine of precedent ("when the Court has applied a rule of law to the litigants in one case it must do so with respect to all others not barred by procedural requirements or res judicata. We do not speculate as to the bounds or propriety of pure prospectivity" [*James B. Beam Distilling Co. v. Georgia, supra,* at 2448]).

It is clear, therefore, that *Chevron Oil,* after *Beam,* continues to maintain its precedential vitality. It also bears noting that in two decisions, *Gager v White* (53 NY2d 475, 483-484), and *Matter of Jessica XX* (54 NY2d 417, 424, *affd sub nom. Lehr v Robertson,* 463 US 248), the Court of Appeals adopted a *Chevron Oil* analysis. Thus we do not agree with the proposition that "[t]he continued viability of the *Chevron* test is left in doubt by [*Beam*]" (*see, Kuhn v Colorado,* 817 P2d 101, 110 [Colo]).

III

In a proper case, *Beam* permits, or more precisely, does not proscribe a reference to the *Chevron Oil* criteria in determining whether a decision should have wholly prospective application. We hold that such an approach is mandated on the facts at bar and that the *Davis* decision fits the *Chevron Oil* criteria for prospective application.

Davis "establish[ed] a new principle of law * * * by deciding an issue of first impression whose resolution was not clearly foreshadowed" (*Chevron Oil Co. v Huson,* 404 US 97, 100, *supra*). The *Davis* decision was predicated on principles of intergovernmental tax immunity, described as "a most esoteric of constitutional philosophies" (*see, Bohn v Waddell,* 164 Ariz 74, 790 P2d 772, 784, *adhered to on reconsideration,* 167 Ariz 344, 807 P2d 1). Indeed, the path from *McCulloch v Maryland* (4 Wheat 316), the *locus classicus* in this area, to *Davis* has been

anything but a straight line (*see, Davis v Michigan Dept of Treasury,* 489 US 803, 810-815, *supra,* per Kennedy, J. for an historical exposition; *see also, Bohn v Waddell, supra*). Moreover, in *Davis,* Justice Stevens delivered a vigorous dissent based on the idea that "[o]nce one understands the underlying reason for the *McCulloch* holding, it is plain that this tax does not unconstitutionally discriminate against federal employees" (*Davis v Michigan Dept of Treasury, supra,* at 821). In language describing the novelty of this split decision, the Arizona Tax Court (Moroney, J.), in *Bohn v Waddell* (*supra*), observed that "[i]f justices of the United States Supreme Court cannot agree that the right defined in *Davis* was clearly established before *Davis,* it hardly seems appropriate to charge the individual [d]efendants in this case with such perspicacity" (*Bohn v Waddell, supra,* at 784).

Turning to the second criterion, nothing in the instant record demonstrates that retroactive application of *Davis* will either retard or further the doctrine of intergovernmental tax immunity. Since the primary purpose of that doctrine is to protect the Federal government, not private individuals, from being unduly burdened by State taxation (*see,* Senate Rep. No. 112, 76th Cong, 1st Sess 13, to accompany HR 3790), mandatory refunds to the plaintiffs would scarcely remove a threat to the efficient operation of the Federal Government. We also remain unpersuaded by the plaintiffs' contention that retroactive application will deter future enactment of illegal statutes. And as to the third *Chevron* criterion, we hold that the equities preponderate in the State's favor. New York State's taxing scheme, enacted in good faith and presumptively valid, was legitimate and in force for 50 years until a new rule was announced in *Davis.* In our view, the State should not be required to refund an estimated $44,000,000, particularly in today's parlous fiscal circumstances, when neither the State nor the plaintiffs could reasonably have anticipated the invalidation of a longstanding tax provision. In sum, a *Chevron Oil* analysis mandates a pro-

spective application of the instant decision. We would also note consistently with the *Beam* decision, that the *Davis* court never applied its own rule since Michigan "*conceded* that a refund [was] appropriate in these circumstances" (*Davis v. Michigan Dept of Treasury, supra,* at 817) [emphasis added]; *see also, Pledger v. Bosnick,* 306 Ark 45, 811 SW2d 286).

To the extent, therefore, that the Supreme Court's order and judgment in the case at bar awarded refunds and similar relief to the plaintiffs, we now modify that order and judgment by deleting those provisions.

IV

We agree, however, with the other conclusions indicated in the Supreme Court's judgment. First, the court properly denied the application for class action status. "It is well settled that class action certification is inappropriate in a case such as this where governmental actions are involved and subsequent plaintiffs will be adequately protected under the doctrine of stare decisis" (*Duffy v Wetzler,* 148 Misc 2d 459, 464, *supra, citing Matter of Crociate v State Tax Commn.,* 133 Misc 2d 855, *affd* 134 AD2d 112, *affd* 73 NY2d 726; *Conklin v Town of Southampton,* 141 AD2d 596). Nothing in the record at bar justifies a departure from this rule. Second, the court's rejection of the plaintiffs' claims under 42 U.S.C. § 1983 was correct. We add only the observation that the defense of qualified immunity, which the court did not reach (*see, Duffy v Wetzler,* 148 Misc 2d 459, 469, *supra*), provided a much simpler basis on which to reject the claims. In *Harlow v Fitzgerald* (457 US 800, 818 [emphasis added]), the United States Supreme Court set forth the parameters of qualified immunity, namely, "that government officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate *clearly established statutory or constitutional rights* of which a reasonable person would have

known" (*see also, Fox v Coughlin*, 893 F2d 475, 477-478; *Neal v Corcoran*, 869 F2d 662, 665, 667-669, *cert denied* 493 US 816; *Walentas v Lipper*, 862 F2d 414, 421-423, *cert denied* 490 US 1021). The claimed right under 4 USC § 111 was not "clearly established" until *Davis*, and so the individual defendants are "shielded from liability for civil damages."

We also agree with the court that, in an action for money had and received, an "appropriate legal protest prior to or at the time of payment [is] a prerequisite to recovery in an action seeking refunds" (*Duffy v Wetzler*, 148 Misc. 2d 459, 469-470, *supra*). The protest requirement was not satisfied at bar. Additionally, the court properly denied the plaintiffs' postjudgment motions seeking variously renewal or reargument of the denial of class certificaiton, permission to add 16 new plaintiffs, intervention by other Federal retirees, and attorneys' fees under the common fund doctrine.

KUNZEMAN, MILLER and O'BRIEN, JJ., concur.

ORDERED that the order and judgment (one paper) of the Supreme Court, Queens County, dated June 14, 1990, is modified by deleting therefrom the provisions which (1) declared that the defendants may not assess and collect personal income taxes on Federal pension benefits received in the years 1986 through 1988 which may be still due and owing, (2) declared that the plaintiffs are entitled to a refund of that portion of their personal income taxes which was paid on Federal pension benefits for the years 1986 through 1988, (3) granted the plaintiffs' summary judgment on the third cause of action, and enjoined the defendants from collecting personal income taxes on Federal pension benefits from 1986 through 1988, and (4) enjoined the defendants from interfering with or refusing to grant the plaintiffs a refund of personal income taxes paid on Federal pension benefits from 1986 through 1988; as so modified, the order and judgment is

affirmed insofar as appealed and cross-appealed from, without costs or disbursements; and it is further,

ORDERED that the orders are affirmed insofar as appealed from, without costs or disbursements.

ENTER:

MARTIN H. BROWNSTEIN
Clerk

January 15, 1992

APPENDIX C

SUPREME COURT,
QUEENS COUNTY
IA PART 7

By: LEVINE, J.

Index No. 7706/89

Dated: April 10, 1990

EUGENE H. DUFFY, *et al.*,

— against —

JAMES W. WETZLER, *et al.*

MEMORANDUM

In this action for declaratory, injunctive and monetary relief plaintiffs seek leave to renew and, upon renewal, certification of this action as a class action, and an order granting partial summary judgment on the second cause of action for declaratory judgment. Defendants Shorris, Grayson, Biderman, Crotty and the City of New York cross-move for an order granting summary judgment dismissing the complaint. Codefendants Wetzler, Chu and Regan cross-motive for an order granting summary judgment dismissing the complaint.

This action was commenced as a result of the March 28, 1989 decision of the United States Supreme Court in *Davis v. Michigan Department of Treasury* (489 US —, 109 S Ct. 1500.) The Supreme Court held that Michi-

gan's tax scheme, which exempted from taxation all retirement benefits paid by the State or its political subdivisions, but levied an income tax on retirement benefits paid by all other employers, including the Federal Government violated federal law. The court therein determined that 4 USC § 111 which permits nondiscriminatory state taxation of the compensation of federal employees, applied to the retirement benefits of federal retirees, and that this statute is coextensive with, and must be determined by reference to, the prohibition against discriminatory taxes embodied in the modern constitutional doctrine of intergovernmental tax immunity. The court therefore found that the Michigan statute violated the principles of intergovernmental tax immunity by favoring retired State and local governmental employees over retired Federal employees. In *Davis* (*supra*), Michigan conceded that under these circumstances a refund was appropriate, and therefore the court determined that Mr. Davis was entitled to a refund. The court, however, made no determination as to whether its decision should be given retroactive effect, and whether the State must provide retrospective relief, such as a tax refund. Mr. Davis' additional claim for prospective relief was left for determination by the State court.

Prior to *Davis* (*supra*), 24 states, including New York, had tax statutes similar to that of Michigan. In New York, pursuant to Article XVI, section 4 of the New York State Constitution pensions paid to officers and employees of the State are exempt from taxation. The pensions of all other employers, including the Federal Government were subject to taxation. In 1981, section 612(c)(3-a) was added to the Tax Law, exempting from income tax the first $20,000 in pension income received by retirees who attained the age of fifty-nine and one-half. Recipients of State and local government pensions, however, remained exempt from taxation pursuant to the State Constitution, and section 612(c)(3) of the Tax Law.

Following *Davis* (*supra*), section 612(c)(3) of the Tax Law was amended to exempt from taxation the pensions of federal employees. (Tax Law § 612[c][3][i], [ii].) This amendment became effective immediately on July 21, 1989 and applied to Federal pension benefits received in taxable years beginning January 1, 1989. Directives issued by the Department of Taxation and Finance provided that any person who may have made a quarterly tax payment during 1989 which was based on a calculation including a tax on a Federal pension would be entitled to a tax credit. The amendment to section 612 (c)(3) of the Tax Law was prospective only, and made no provision for retrospective relief for income taxes paid on Federal pension benefits received prior to January 1, 1989. Section 612(c)(3-a) remains in effect, and is applicable to taxes which were paid or remain due and owing on Federal pension benefits which were received prior to January 1, 1989. The Administrative Code of the City of the New York, section 11-1712(c)(3) was amended in an identical fashion to exempt Federal pension benefits from taxation by the City of New York.

This action was commenced prior to the July 1989 amendments to the State Tax Law and the Administrative Code of the City of New York. A second amended complaint was served in December 1989. Plaintiffs Eugene H. Duffy, James Sweezy and Fernando S. Maura are former employees of the Federal Government and each receive Federal retirement benefits. Coplaintiffs Alice Duffy and Agnes Sweezy are the wives of Eugene Duffy and James Sweezy, respectively, and are named as plaintiffs herein solely as their status as joint tax return filers with their respective husbands. Mr. and Mrs. Duffy previously resided in Suffolk County and are currently residents of Queens County. Mr. Duffy is over the age of 59½ years and filed joint New York State income tax returns for the years 1986 through 1988. Mr. and Mrs. Sweezy are residents of Queens County and filed joint New York City and New York State income tax returns for the

years 1986 through 1988. Mr. Sweezy is also over the age of 59½ years. Mr. Maura is a resident of White Plains, New York, is under the age of 59½ years, and filed New York State income tax returns for 1986 through 1988. Plaintiffs commenced this action, individually and as representatives of all Federal pensioners similarly situated. Defendants James W. Wetzler, the present New York State Commissioner of Taxation and Finance, and former State Commissioner Roderick Chu, and Edward V. Regan, Comptroller of the State of New York (hereinafter "State defendants"), are being sued in their individual and official capacities. Codefendants Anthony Shorris, the present Commissioner of Finance of the City of New York, and former Commissioners Stanley E. Grayson, Abraham Biderman, and Paul Crotty (hereinafter "City defendants") are also being sued in their individual and official capacities. The City of New York is also named as a codefendant.

Plaintiffs assert that section 612(c)(3-a) of the Tax Law which imposes a State income tax on Federal pensions received prior to January 1, 1989, subject to a $20,000 deduction for receipients 59½ years old, is unconstitutional and illegal in light of *Davis* (*supra*). Plaintiffs' first cause of action for damages under 42 USC § 1983 alleges a civil right violation based on the City and State defendants' alleged refusal to recognize and grant plaintiffs' right to a refund of unlawfully collected taxes. It is alleged that the City and State defendants acted in their individual and official capacities, and plaintiffs seek damages "in the amount equal of all monies unlawfully paid to and/or collected" by defendants as New York City and State income taxes on their retirement benefits during the years 1986 to the present. Plaintiffs have made no demand on defendants for a declaration of invalidity and unconstitutionality and allege that this would be useless and futile.

Plaintiffs, in their second cause of action, seek a declaration to the effect that: (i) the taxing scheme imposed

by the State and City of New York prior to 1989 which imposed an income tax on their Federal pension benefits while exempting the pensions of State and local retirees, is invalid and unconstitutional under 4 USC § 111, Article VI, clause 2 of the United States Constitution, the Fourteenth Amendment to the United States Constitution, and principles of intergovernmental tax immunity; (ii) that plaintiffs are entitled to damages in the amount of all income taxes paid or collected from 1986 to the present on such benefits; (iii) that the further collection or enforcement of such income taxes attributable to any tax year prior to 1989 is invalid and unconstitutional; and (iv) refund rights granted to taxpayers for individual income taxes illegally collected may not be qualified by permitting such refunds only prospectively.

The third cause of action seeks injunctive relief against the further collection of the alleged unconstitutional tax imposed on Federal pensions for the years prior to 1989. The fourth cause of action is against defendant City of New York for money had and received.

Plaintiffs now seek leave to renew and, upon renewal, seek an order granting class certification pursuant to CPLR 901 and 902. Plaintiffs further seek an order granting summary judgment on the second cause of action for declaratory judgment. The City defendants and the City of New York, and the State defendants each cross-move for summary judgment dismissing the complaint in its entirety on the grounds that it fails to state a cause of action.

Plaintiffs' request for renewal is granted, as issue has now been joined and, upon renewal, the request for class certification is denied. Plaintiffs' reliance on post *Davis* (*supra*), class action litigation in sister states, as well as their attempts to distinguish *Brady v State of New York* (Supreme Court, Albany County, Prior J, August 23, 1989), and *Crociata v State Tax Commission* (133 Misc 2d 855, *affd* 134 AD2d 112, *affd* 73 NY2d 776), are un-

persuasive. It is well settled that class action certification is inappropriate in a case such as this where governmental actions are involved and subsequent plaintiffs will be adequately protected under the doctrine of stare decisis. (*Matter of Crociata v State Tax Commission, supra; Conklin v Town of Southampton*, 141 AD2d 596.) Plaintiffs have failed to demonstrate that this case presents an exception to this well established rule. Plaintiffs contend that class action is a superior method of adjudicating this controversy because the governmental entities cannot be trusted with the welfare of these Federal retirees. The court finds this argument unavailing. While the taxing authorities have taken the position that *Davis* (*supra*) does not apply retroactively and therefore does not require a tax refund, plaintiffs' assertion that the defendants will refuse to grant such refunds if so ordered is purely speculative.

Furthermore, while plaintiffs purportedly seek money damages pursuant to 42 USC § 1983, it is clear from the complaint that plaintiffs are in fact seeking a declaratory judgment, injunctive relief and a tax refund. Class action status, therefore, is inappropriate. A class action may not be used to protect members of the proposed class who paid the tax without registering a protest. Generally, a tax voluntarily paid may not be recovered. (*City of Rochester v Chiarella*, 65 NY2d 92, 99; *Mercury Mach. Importing Corp. v City of New York*, 3 NY2d 418, 425; *Adrico Realty Corp. v City of New York*, 250 NY2d.) In addition, non-protesting taxpayers may not enhance their tax refund claims through the use of a class action. (*Gandolfi v City of Yonkers, supra.*) Finally, it is clear that a claim for a tax refund is personal to the taxpayer. (*Gandolfi v City of Yonkers, supra*, at 198; *Conklin v Town of Southampton, supra.*) The court therefore, finds that the commencement of this action purportedly on behalf of all similarly situated taxpayers does not constitute an appropriate indication of protest by each proposed

member of the class. *Conklin v Town of Southampton, supra,* at 598-599.)

The *Davis* (*supra*) decision mandates that this court decalre that the City and State personal income tax scheme, which taxed Federal pension benefits, while exempting State and local pension benefits, is discriminatory, unconstitutional and invalid. Contrary to defendants' assertions, the Legislature in enacting section 612(c)(3)(ii) of the Tax Law, and section 11-1712(c)(3) of the Administrative Code did not repeal or annul the former taxing provisions. These amendments are prospective only and exclude from taxation Federal pension benefits received on January 1, 1989 or later. Thus, Federal pension benefits received in years prior to 1989 remain subject to taxation and collection to the extent that the Statute of Limitations applies.

The Supreme Court in *Davis* (*supra*) did not announce whether its decision had retrospective or prospective application. In *Davis* (*supra*) Michigan conceded that the taxpayer was entitled to a refund and therefore the court made no further pronouncements on the issue of a refund. The Supreme Court in citing *Iowa-Des Moines Bank v Bennett* (284 US 239, 247), indicated that to the extent that the taxpayer paid taxes pursuant to an invalid tax scheme, he was entitled to a refund. Defendants, however, in view of this uncertainty argue that this court should apply the test announced in *Chevron Oil Co. v Huson* (404 US 97), and apply *Davis* prospectively only, thereby denying plaintiffs a refund.

The court finds that it need not determine whether *Davis* (*supra*) should have prospective or retroactive application, as the question of entitlement, method and extent of a tax refund is governed by New York's Tax Law. New York has waived its sovereign immunity to the extent provided by section 687(a) of the Tax Law, which provides in pertinent part:

> "Claim for credit or refund of an overpayment of an income tax shall be filed by the taxpayer within three years from the time the return was filed or two years from the time the tax was paid, whichever period expires the later * * *."

The term "overpayment" is not defined in the Tax Law. However, section 607(a) of the Tax Law provides that any term used in the Tax Law is deemed to have the same meaning as when used in a comparable tax of the Federal Income Tax Law. Thus, in construing section 6511 of the Internal Revenue Code, which is comparable to section 687 of the Tax Law, it has been held that overpayments arising out of the payment of a tax later held to be unconstitutional are recoverable in the same manner as other overpayments, provided that a timely claim is filed. (*Jones v Liberty Glass Co.*, 332 US 524, *reh denied* 333 US 850; *Kavenagh v Noble*, 332 US 524, *reh denied* 333 US 850; *Wisconsin National Life Ins. Co. v U.S.*, 42 F2d 316; *cf., City of Rochester v Chiarella*, 65 NY2d 92; *Niagara Mohawk Power Corp. v City School District of the City of Troy*, 59 NY2d 262.)

Defendants assert that a tax refund is not mandated here, as the Court of Appeals has permitted municipalities to retain revenues collected under unconstitutional real property taxes and have given such statutes prospective application only. (*Hurd v City of Buffalo*, 41 AD2d 402, *affd* 34 NY2d 628; *Matter of Slewett and Farber v Board of Assessors of the County of Nassau*, 54 NY2d 547; *Bethlehem Steel v Board of Education*, 61 AD2d 147, *affd* 44 NY2d 836; *Matter of Hellerstein v Assessor of the Town of Islip*, 37 NY2d 1.) This line of cases, however, are clearly distinguishable from the case at bar. Each of these cases involved a challenge to real property tax assessment rolls used by the various localities pursuant to the Real Property Tax Law. The Court of Appeals in *Foss* (*supra*), *Hellerstein* (*supra*), and *Hurd* (*supra*) did not require refunds of improperly or over-assessed

property as this would have required the localities to reassess all of the property in those localities, equalize the assessments, locate the property owners and make the appropriate refunds or demands for the additional payment of taxes. Moreover, these localities depended upon the real property tax assessments to formulate and adopt a budget, and these revenues had already been spent.

In contrast, the case at bar involves the right to a refund of personal income taxes. This court has failed to discover a single reported case in which the courts of this State have refused to refund monies collected pursuant to a provision of the Tax Law or, more specifically, the personal income tax provisions of Article 22, which was later declared unconstitutional. Accordingly, the cases relied upon by defendants fail to provide a basis for a denial of a refund of personal income taxes paid under an unconstitutional taxing scheme. In addition, the obvious and substantial differences between real property taxes and personal income taxes militate against the application of this line of cases to income tax cases. Personal income taxes are paid into the general revenue and defendants do not claim that the State or City relied upon the taxation of Federal pension benefits in the formulation of their respective budgets. While the court is mindful of the current budgetary crisis facing the State and City, it is constrained to declare that if plaintiffs meet the procedural requirements, they are entitled to a refund to the extent they paid taxes on Federal pension benefits which were included in their personal income tax returns for the years 1986 through 1988.

Turning now to defendants' cross motions summary judgment, the request to dismiss the first cause of action for damages pursuant to 42 USC § 1983, is granted. Plaintiffs, in their complaint, allege that the City defendants, in their official and individual capacities, violated plaintiffs' rights under 4 USC § 111 and the Constitution, by subjecting them to a discriminatory tax scheme, and

by refusing to recognize and grant plaintiffs' clearly established right to a refund of the unlawfully collected taxes.

At the outset, the court notes that plaintiffs may not maintain an action for damages against the State of New York, or against the State defendants, in their official capacities, pursuant to 42 USC § 1983. (*Will v Michigan Dept. of State Police,* —— US ——, 109 S Ct 2304.) Municipal entities and their officials, however, may be sued in their official and individual capacities. (*Monell v New York City Dept. of Social Services,* 436 US 658.)

The collection and administration of New York City's personal income tax, as well as refunds of such tax, was taken over by the State of New York in 1975. (Administrative Code of New York City §§ 11-1797[a], 11-1798.) The State Tax Commissioner is charged with the administration and enforcement of the City personal income tax, and all refunds of said tax are paid by the State Comptroller out of a reserve fund established for that purpose. Plaintiffs have failed to establish that the City of New York and the City defendants engaged in any conduct concerning the enforcement of the challenged tax scheme, the collection of taxes, or the right to a refund. The City defendants therefore may not be sued under § 1983 for functions which are performed by State tax officials. Plaintiffs' § 1983 claims against the City defendants and the City of New York are therefore dismissed.

The thrust of plaintiffs' § 1983 claims against the State defendants is that under State law, plaintiffs were required to pay personal income taxes on their Federal pensions benefits from 1986 through 1988. Plaintiffs allege that the State law violated 4 USC § 111 and the doctrine of intergovernmental tax immunity and that this should have been clear to the State defendants prior to *Davis.* Plaintiffs further assert that following *Davis,* the State defendants failed to grant plaintiffs a refund of those taxes. Plaintiffs, however, have failed to establish that

they paid the taxes in question due to any personal action taken against them by the State defendants. Rather, the taxes paid by plaintiffs were imposed by State law, and defendants Wetzler, Chu and Regan were not personally involved in the collection and assessment of plaintiffs' State personal income taxes. There has been no showing that any of the State defendants personally engaged in any activity in connection with the taxation of Federal pensions so as to give rise to a § 1983 claim. The fact that these defendants were or are in a high position of authority is an insufficient basis for the imposition of personal liability. (*McKinnon v Patterson*, 568 F2d 930, 934; *see generally, City of Canton, Ohio v Harris*, —— US ——, 109 S Ct 1197.)

In addition, the court notes that defendant Chu left the office of Commissioner of the Department of Taxation and Finance approximately nine months prior to the *Davis* decision. Thus, it is clear that defendant Chu was not involved in any decision regarding post *Davis* refunds. As this court has previously stated, *Davis* did not establish a clear right to retrospective relief, such as a tax refund. Moreover, in the absence of a refund demand by plaintiffs prior to the commencement of this action, no such refund could be certified by defendant Wetzler or issued by defendant Regan. Therefore, in the absence of a factual showing that the State defendants acting under color of State law participated individually in a civil rights violation, plaintiffs' § 1983 claim must be dismissed. (*Al-Jundi v Estate of Rockefeller*, 885 F2d 1060; *Williams v Smith*, 781 F2d 319, 323-324; *Taylor v. Mayone*, 636 F2d 247.) In view of the foregoing this court need not reach plaintiffs' claims of due process and equal protection, or defendants' defenses of exhaustion of administrative remedies and qualified immunity.

That branch of defendants' cross motions which seek to dismiss plaintiffs' third cause of action for injunctive relief is denied. Contrary to defendants' assertions, this

caus of action is not moot, as New York's taxing scheme which taxes Federal pension benefits reveived prior to January 1, 1989 has not been annulled or repealed. In view of the fact that this court has declared this tax scheme to be invalid and unconstitutional, and has declared that plaintiffs may seek a refund of taxes paid on Federal pension benefits from 1986 through 1988, reverse summary judgment granting injunction relief is appropriate. The State defendants are therefore enjoined from assessing and collecting personal income taxes on Federal pension benefits which may be due and owing for the years 1986 through 1988, and are further enjoined from interfering with plaintiffs' right to file for a refund of personal income taxes paid on Federal benefits for the years 1986 through 1988.

Finally, that branch of defendant City of New York cross motion to dismiss plaintiffs' fourth cause of action for money had and received is granted. An action for money had and received may be used to recover taxes which have been collected in violation of constitutional authority. (*Matter of Trezec v City of New York,* 66 NY2d 807.) However, it is incumbent upon the taxpayer to establish appropriate legal protest prior to or at the time of payment as a prerequisite to recovery in an action seeking refunds. (*See, City of Rochester v Chiarella,* 58 NY2d 316; *Zuckerman v City of New York,* 49 NY2d 415; *Angeline v City of Rochester,* 72 AD2d 445, *affd* 52 NY2d 982; *Bethlehem Steel Corp. v Board of Educ.,* 61 AD2d 147, *affd* 44 NY2d 831.) While the commencement of a declaratory judgment action to challenge an assessment under a tax statute may constitute sufficient protest, ordinarily protest must be made at the time of payment for each year in which recovery is sought. (*See, City of Rochester v Chiarella, supra; Riverdale Country School v. City of New York,* 13 AD2d 103, *affd* 11 NY2d 741.) This requirement is also satisfied when the pendency of either a declaratory judgment action or other legal proceeding challenging the assessment is

still pending at the time of payment in each year in which recovery is sought. (*Corporate Properties Investors v Board of Assessors of the County of Nassau*, —— AD2d ——, 545 NYS2d 166, 170.) In the case at bar, plaintiffs have failed to establish compliance with the protest requirement. No protest was made by plaintiffs at the time they paid personal income taxes on Federal pension benefits received in the years 1983 through 1988. Furthermore, the within action was not commenced until May 8, 1989 which was after plaintiffs paid personal income taxes due on April 17, 1989, for Federal pension benefits received in 1988. Therefore, no action was pending at the time of payment for the years in which recovery is now sought.

In view of the foregoing, plaintiffs' motion for renewal is granted, and upon renewal, the request for class certification is denied. That branch of plaintiffs' motion which seeks partial summary judgment on the second cause of action for declaratory judgment is granted, and it is the declaration of this court that:

(1) The City and State personal income tax scheme which taxed Federal pension benefits received prior to January 1, 1989, while exempting from taxation State and local pension benefits, is discriminatory, invalid and unconstitutional in light of *Davis* (*supra*);

(2) The City and State defendants therefore may not assess and collect personal income taxes on Federal pension benefits received in the years 1986 through 1988, which may be still due and owing;

(3) Plaintiffs are entitled to a refund of that portion of their personal income taxes which was paid on Federal pension benefits for the years 1986 through 1988, provided that they file for a refund and meet the procedural requirements for a refund under the Tax Law.

The City defendants' and the City of New York's cross motion to dismiss the complaint is granted as to the first

and fourth causes of action, and is denied as to the third cause of action. The State defendants' cross motion to dismiss the complaint is also granted as to the first cause of action and is denied as to the third cause of action. Reverse summary judgment in favor of the plaintiffs is granted on the third cause of action, and the City and State defendants are enjoined from assessing and collecting personal income taxes on Federal pension benefits for the years 1986 through 1988, which may still be due and owing. Defendants are further enjoined from interfering with or refusing to grant plaintiffs a refund of personal income taxes paid on Federal pension benefits for the years 1986 through 1988, provided that plaintiffs meet all the procedural requirements for a refund under the Tax Law. Finally, defendants' requests for sanctions is denied.

Settle order.

_____

J.S.C.

APPENDIX D

At an IAS Part 7 of the Supreme Court, State of New York, County of Queens, at the Queens County Courthouse, 120-55 Queens Boulevard, Kew Gardens, New York, on the 14th day of June, 1990.

PRESENT: HON. ALAN LEVINE, Justice.

Index No. 7706/89

EUGENE H. DUFFY, ALICE G. DUFFY, JAMES SWEEZY, AGNES SWEEZY and FERNANDO S. MAURA, on behalf of themselves and all residents of the State of New York who were paid retirement benefits by the United States Government and who paid and/or are subject to New York State and/or New York City Income Taxes thereon in any one or all of the years during the period 1986 through the present, similarly situated,

Plaintiffs,

-against-

JAMES W. WETZLER and RODERICK G.W. CHU, individually and as present or former NEW YORK STATE COMMISSIONER OF TAXATION AND FINANCE, EDWARD V. REGAN, individually and as COMPTROLLER OF THE STATE OF NEW YORK, ANTHONY SHORRIS, STANLEY G. GRAYSON, ABRAHAM BIDERMAN and PAUL CROTTY, individually and as present or former COMMISSIONER OF FINANCE OF THE CITY OF NEW YORK, and THE CITY OF NEW YORK,

Defendants.

ORDER AND JUDGMENT

The plaintiffs having commenced this action for declaratory, injunctive and monetary relief challenging the validity and constitutionality of New York Tax Law § 612(c)(3) and Administrative Code of the City of New York § 11-1712(c)(3) in imposing personal income tax on certain pension income of retired federal employees who attained the age of fifty-nine and one-half, while the pension benefits of state and local government retirees remain exempt from taxation pursuant to the State Constitution, and the plaintiffs having moved for partial summary judgment for declaratory relief pursuant to CPLR 3212(e) and 42 U.S.C. § 1983, and for renewal of their prior motion for class certification pursuant to Article 9, CPLR, and the defendants having cross-moved for summary judgment dismissing the complaint and for sanctions;

NOW, upon reading and filing the copy of the second amended summons and the copy of the verified complaint verified December 13, 1989; the verified answer of defendants Shorris, Grayson, Biderman, Crotty and the City of New York to the second amended complaint verified January 9, 1990; the verified answer of defendants Wetzler, Chu and Regan to the second verified complaint verified January 5, 1990; the notice of motion of plaintiffs dated January 10, 1990, seeking an order and judgment granting partial summary judgment to plaintiffs, granting leave to renew their motion for class certification and, upon renewal, certifying this action as a class action; the affirmation of John J. Phelan, III, dated January 10, 1990, in support thereof; the affirmation of Michael F. Fitzgerald, dated January 10, 1990, in support thereof and the exhibits and documents annexed thereto; and the copy of the affidavit of Howard J. Sample, sworn to June 13, 1989, in support thereof; the notice of cross-motion dated January 17, 1990, by defendants Wetzler, Chu and Regan seeking an order and judgment summary judgment dismissing the complaint herein and imposing

sanctions against plaintiffs; the affirmation of August L. Fietkau, dated January 17, 1990, in support of the cross-motion and in opposition to the plaintiffs' motion; the affidavit of Roderick G.W. Chu, sworn to January 12, 1990, in opposition to the plaintiffs' motion and in support of the cross-motion; the affidavit of William F. Collins, sworn to January 12, 1990, in opposition to the plaintiffs' motion and in support of the cross-motion; the affirmation of George H. Weissman, dated January 16, 1990, in opposition to the plaintiffs' motion and in support of the cross-motion and the exhibits and documents annexed thereto; the notice of cross-motion dated January 17, 1990 by defendants Shorris, Grayson, Biderman, Crotty and the City of New York seeking an order and judgment granting summary judgment dismissing the complaint and imposing sanctions; and the affirmation of Frances J. Henn dated January 17, 1990, in opposition to plaintiffs' motions and in support of the cross-motion and the exhibits and documents annexed thereto; the reply affirmation of Michael F. Fitzgerald dated February 7, 1990, in support of plaintiffs' motion and in opposition to the cross-motions; and the affidavit of Walter Hellerstein, sworn to February 5, 1990, in support of plaintiffs' motion and in opposition to the cross-motions and the exhibits and documents annexed thereto; the reply affirmation of August L. Fietkau, dated February 14, 1990, in opposition to the plaintiffs' motion and in support of the cross-motions, and the exhibit annexed thereto; the reply affirmations of Eugene O. Duffy, affirmed February 5, 1990 and February 6, 1990, and the exhibits and documents annexed thereto; the affidavit of plaintiff, Eugene H. Duffy, sworn to February 19, 1990 in support of plaintiffs' motions and in opposition to the cross-motions; the sur-reply affirmation of Michael F. Fitzgerald dated February 26, 1990, and the copy of the sur-reply affirmation of Eugene H. Duffy dated February 22, 1990, in support of the plaintiffs' motion and in opposition to the cross-motions;

AND the motion and cross-motions having come on to be heard before the court, and Phelan & Costello (John J. Phelan, Esq., of counsel), having appeared as attorneys for plaintiffs; and Robert Abrams, Attorney General of the State of New York (August L. Fietkau, Assistant Attorney General, of counsel), having appeared as attorney for defendants Wetzler, Chu and Regan, and Victor Kovner, New York City Corporation Counsel (Frances Henn, Assistant Corporation Counsel, of counsel), having appeared for defendants Shorris, Grayson, Biderman, Crotty and City of New York; and the motion and cross-motions having been submitted at such time; and due consideration having been had thereon and the Court having rendered a memorandum decision dated April 10, 1990;

NOW, on motion of Robert Abrams, Attorney General of the State of New York, attorney for defendants Wetzler, Chu and Regan, and of Victor Kovner, New York City Corporation Counsel, attorney for defendants Shorris, Grayson, Biderman, Crotty and City of New York, it is hereby

ORDERED AND ADJUDGED that that portion of plaintiffs' motion which seeks renewal of their prior application for class certification is granted, and upon renewal, the request for class certification is denied; and it is further

ORDERED, ADJUDGED AND DECREED that the City defendants and the City of New York's cross-motion for summary judgment dismissing the complaint is granted as to the first cause of action, under 42 U.S.C. § 1983, and the fourth cause of action, for monies had and received, and is denied as to the third cause of action, for injunctive relief; and it further

ORDERED, ADJUDGED AND DECREED that the State defendants' cross-motion for summary judgment dismissing the complaint is also granted as to the first cause of action, under 42 U.S.C. § 1983, and is denied

as to the third cause of action, for injunctive relief; and it is further

ORDERED, ADJUDGED AND DECREED that that branch of the defendants' cross-motions for sanctions is denied; and it is further

ORDERED, ADJUDGED AND DECREED that that branch of plaintiffs' motion which seeks partial summary judgment on the second cause of action for declaratory judgment is granted, and it is the declaration of this court that:

> (1) the City and State personal income tax scheme which taxed federal pension benefits received prior to January 1, 1989, while exempting from taxation state and local pension benefits, is discriminatory, invalid and unconstitutional in light of *Davis v. Michigan Department of Treasury*, 489 U.S. ——, 109 S. Ct. 1500 (1990); and
>
> (2) the City and State defendants therefore may not assess and collect personal income taxes on federal pension benefits received in the years 1986 through 1988, which may be still due and owing; and
>
> (3) plaintiffs are entitled to a refund of that portion of their personal income taxes which was paid on federal pension benefits for the years 1986 through 1988, provided that they file for a refund and meet the procedural requirements for a refund under the tax law;

and it is further

ORDERED, ADJUDGED AND DECREED that summary judgment in favor of the plaintiffs is granted on the third cause of action, for injunctive relief, and the City and State defendants are enjoined from assessing and collecting personal income taxes on federal pension benefits for the years 1986 through 1988, which may still be due and owing; and it is further

ORDERED, ADJUDGED AND DECREED that the defendants are enjoined from interfering with or refusing to grant plaintiffs a refund of personal income taxes paid on federal pension benefits for the years 1986 through 1988, provided that plaintiffs meet all the procedural requirements for, and establish entitlement to, a refund under the tax law.

ENTER

/s/ AZ
J.S.C.
John J. Durante
Clerk

APPENDIX E

SUPREME COURT OF THE UNITED STATES

No. 92-521

EUGENE H. DUFFY, *et al.*,
Petitioners

v.

JAMES W. WETZLER, *et al.*

On Writ of Certiorari to Appellate Division
Supreme Court of New York,
Second Judicial Department.

THIS CAUSE having been submitted on the petition for a writ of certiorari and response thereto,

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this Court that the judgment of the above court in this cause is vacated and the case is remanded to the Appellate Division, Supreme Court of New York, Second Judicial Department, for further consideration in light of *Harper v. Virginia Department of Taxation*, 509 U.S. —— (1993).

IT IS FURTHER ORDERED that the petitioners Eugene H. Duffy, et al. recover from James W. Wetzler, et al. Three Hundred Dollars ($300.00) for their costs herein expended.

June 28, 1993

Clerk's costs: $300.00

APPENDIX F

STATE OF NEW YORK
COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the first day of September 1994

Present, HON. JUDITH S. KAYE, *Chief Judge, presiding*

2-10 Mo. No. 1103

EUGENE H. DUFFY, *et al.*,
Appellants,
v.
JAMES W. WETZLER, *et al.*,
Respondents.

A motion for leave to appeal to the Court of Appeals and for a stay in the above cause having heretofore been made upon the part of the appellants herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion be and the same hereby is denied; and it is

ORDERED, that the said motion for a stay be and the same hereby is dismissed as academic, leaving the Appellate Division order of August 8, 1994 containing a partial injunction operative.

/s/ Donald M. Sheraw
DONALD M. SHERAW
Clerk of the Court

APPENDIX G

EXCERPTS OF RELEVANT NEW YORK LAW

§ 607. Meaning of Terms

(a) General. Any term used in this article shall have the same meaning as when used in a comparable context in the laws of the United States relating to federal income taxes, unless a different meaning is clearly required but such meaning shall be subject to the exceptions or modifications prescribed in this article or by statute. Any reference in this article to the laws of the United States shall mean the provisions of the internal revenue code of nineteen hundred eighty-six (unless a reference to the internal revenue code of nineteen hundred fifty-four is clearly intended), and amendments thereto, and other provisions of the laws of the United States relating to federal income taxes, as the same may be or become effective at any time or from time to time for the taxable year.

§ 687. Limitations on Credit or Refund

(a) General.—Claim for credit or refund of an overpayment of income tax shall be filed by the taxpayer within three years from the time the return was filed or two years from the time the tax was paid, whichever of such periods expires the later, or if no return was filed, within two years from the time the tax was paid. If the claim is filed within the three year period, the amount of the credit or refund shall not exceed the portion of the tax paid within the three years immediately preceding the filing of the claim plus the period of any extension of time for filing the return unless such claim is for a credit or a portion thereof pursuant to subsection (e) of section six hundred six of this chapter. If the claim is not filed within the three year period, but is filed within the two year period, the amount of the credit or refund shall not exceed the portion of the tax paid during the

two years immediately preceding the filing of the claim unless such claim is for a credit or a portion thereof provided pursuant to subsection (e) of section six hundred six of this chapter. Except as otherwise provided in this section, if no claim is filed, the amount of a credit or refund shall not exceed the amount which would be allowable if a claim had been filed on the date the credit or refund is allowed.

PRE-1989 DISCRIMINATORY SCHEME

The N.Y.S. Tax Law 612(c)(3) provides as follows:

> (c) Modifications reducing federal adjusted gross income. There shall be subtracted from federal adjusted gross income:
>
> (3) Pensions to officers and employees of this state, its subdivisions and agencies, to the extent includible in gross income for federal income tax purposes;

N.Y. Tax Law § 612(c)(3) (McKinney 1987 & Supp. 1990)*

The New York City Administrative Code § 11-1712(c)(3) provides as follows:

> (c) Modifications reducing federal adjusted gross income. There shall be subtracted from federal adjusted gross income:
>
> (3) Pensions to officers and employees of this state, its subdivisions and agencies, to the extent includable in gross income for federal income tax purposes;

New York, N.Y., Administrative Code § 11-1712(c)(3) (1986 & Supp. 1990).*

---

* On July 21, 1989, the Legislature of the State of New York amended N.Y. Tax Law 612(c)(3) and New York City Administrative Code § 11-1712(c)(3) by removing the unconstitutional pro-

§ 901. Prerequisites to a class action.

a. One or more members of a class may sue or be sued as representative parties on behalf of all if:

1. the class is so numerous that joinder of all members, whether otherwise required or permitted, is impracticable;

2. there are questions of law or fact common to the class which predominate over any questions affecting only individual members;

3. the claims or defenses of the representative parties are typical of the claims or defenses of the class;

4. the representative parties will fairly and adequately protect the interest of the class; and

5. a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

* * * *

§ 5514. Extension of time to take appeal or to move for permission to appeal.

(a) Alternate method of appeal. If an appeal is taken or a motion for permission to appeal is made and such appeal is dismissed or motion is denied and, except for time limitations in section 5513, some other method of taking an appeal or of seeking permission to appeal is available, the time limited for such other method shall be computed from the dismissal or denial unless the court to which the appeal is sought to be taken orders otherwise.

* * * *

---

vision that discriminated against federal retirees. The amendments apply to federal pension income received in taxable years beginning January 1, 1989.

§ 5601. Appeals to the court of appeals as of right.

* * * *

(b) Constitutional grounds. An appeal may be taken to the court of appeals as of right:

1. from an order of the appellate division which finally determines an action where there is directly involved the construction of the constitution of the state or of the United States; . . .

* * * *

§ 5602. Appeals to the court of appeals by permission.

(a) Permission of appellate division or court of appeals. An appeal may be taken to the court of appeals by permission of the appellate division granted before application to the court of appeals, or by permission of the court of appeals upon refusal by the appellate division or upon direct application. Permission by an appellate division for leave to appeal shall be pursuant to rules authorized by that appellate division. Permission by the court of appeals for leave to appeal shall be pursuant to rules authorized by the court which shall provide that leave to appeal be granted upon the approval of two judges of the court of appeals. Such appeal may be taken:

1. in an action originating in the supreme court, a county court, a surrogate's court, the family court, the court of claims, an administrative agency or an arbitration,

(i) from an order of the appellate division which finally determines the action and which is not appealable as of right, . . .

* * * *

APPENDIX H

STATE OF NEW YORK
COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the seventh day of April A.D. 1992.

Present, HON. SOL WACHTLER, Chief Judge, presiding

Mo. No. 376 SSD 31

EUGENE H. DUFFY, *et al.*,
Appellants,

ALBERT ENGEL, *et al.*,
Proposed Intervenors-Appellants,

v.

JAMES W. WETZLER, *et al.*,
Respondents.

The appellants and proposed intervenors-appellants having filed notice of appeal in the above title and due consideration having been thereupon had, it is

ORDERED, that the appeal from so much of the Appellate Division order as affirmed Supreme Court's orders denying plaintiffs' post-judgment motions to renew or reargue the denial of class certification, for permission to add intervenors, and to supplement plaintiffs' pleadings, be and the same hereby is dismissed without costs, by the Court *sua sponte*, upon the ground that that portion of

the order appealed from does not finally determine the action within the meaning of the Constitution; and it is

ORDERED, that the appeal otherwise be and the same hereby is dismissed without costs, by the Court *sua sponte,* upon the ground that no substantial constitutional question is directly involved.

Judge Simons took no part.

/s/ Donald M. Sheraw
DONALD M. SHERAW
Clerk of the Court

APPENDIX I

STATE OF NEW YORK
COURT OF APPEALS

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the seventh day of July A.D. 1992.

Present, HON. SOL WACHTLER, Chief Judge, presiding.

2-14 Mo. No. 570

EUGENE H. DUFFY, *et al.*,
Appellants,

ALBERT ENGEL, *et al.*,
Proposed Intervenors-Appellants,

v.

JAMES W. WETZLER, *et al.*,
Respondents.

A motion for leave to appeal to the Court of Appeals in the above cause having heretofore been made upon the part of the appellants and proposed intervenors-appellants herein and papers having been submitted thereon and due deliberation having been thereupon had, it is

ORDERED, that the said motion for leave to appeal from so much of the Appellate Division order as affirmed Supreme Court's order denying plaintiffs' post-judgment motion to renew or reargue the denial of class certification be and the same hereby is dismissed upon the ground that that portion of the order sought to be ap-

pealed from does not finally determine the action within the meaning of the Constitution; and it is

ORDERED, that the said motion for leave to appeal otherwise be and the same hereby is denied.

/s/ Stuart M. Cohen
STUART M. COHEN
Deputy Clerk of the Court

APPENDIX J

SUPREME COURT OF THE
STATE OF NEW YORK
APPELLATE DIVISION
SECOND JUDICIAL DEPARTMENT

GUY JAMES MANGANO, P.J.
WILLIAM C. THOMPSON
SONDRA MILLER
CORNELIUS J. O'BRIEN
MYRIAM J. ALTMAN, JJ.

90-07800

EUGENE H. DUFFY, *et al.*,
respondents-appellants,

v.

JAMES W. WETZLER, *et al.*,
appellants-respondents.

DECISION & ORDER ON MOTION

Motion by Anderson Kill Olick & Oshinsky, P.C., the co-counsel of the plaintiffs, to enjoin the defendants from making any distribution to members of the putative class that is conditional in any way or seeks a release or any other compromise in return for such payments, from distributing to the plaintiffs and members of the putative class amounts greater than 80% of their respective claim for refunds for taxes illegally assessed on Federal pensions, including interest thereon, from otherwise interfering with the lien held by Anderson Kill Olick & Oshinsky, P.C., Phenan & Costello, P.C., and O'Neil Cannon & Hollman, S.C., on the proceeds of the refunds and interest, from otherwise breaching the fiduciary duties they

hold as trustees of a constructive trust of the common fund in this action, and for related relief, pending reconsideration by this court, upon remittitur from the Supreme Court of the United States, of appeals and cross appeals from an order and judgment of the Supreme Court, Queens County, entered June 26, 1990, and an order of the same court, dated October 1, 1990.

Upon the papers submitted in support of the motion and the papers submitted in opposition thereto, it is

ORDERED that the motion is held in abeyance, pending oral argument with respect thereto; and it is further,

ORDERED that oral argument of the motion shall be held on Wednesday, September 14, 1994, at 12 noon; and it is further,

ORDERED that pending hearing and determination of the motion, the defendants are enjoined from making any distribution to members of the putative class that is conditional in any way or seeks a release or any other compromise in return for such payments, from distributing to the plaintiffs and members of the putative class amounts greater than 80% of their respective claim for refunds for taxes illegally assessed on Federal pensions, including interest thereon, from otherwise interfering with the lien held by Anderson Kill Olick & Oshinsky, P.C., Phenan & Costello, P.C., and O'Neil Cannon & Hollman, S.C., on the proceeds of the refunds and interest, from otherwise breaching the fiduciary duties they hold as trustees of a constructive trust of the common fund in this action.

MANGANO, P.J., THOMPSON, MILLER, O'BRIEN and ALTMAN, JJ., concur.

ENTER:

MARTIN H. BROWNSTEIN
Clerk

APPENDIX K

COURT OF APPEALS
STATE OF NEW YORK

Queens County Clerk's Index No. 7706/89

Appellate Division Second Dept.
Case Nos: 90-07800, 91-02056

EUGENE H. DUFFY, ALICE G. DUFFY, JAMES SWEEZY, AGNES SWEEZY and FERNANDO S. MAURA, on behalf of themselves and all residents of the State of New York who were paid retirement benefits by the United States Government and who paid and/or are subject to New York State and/or New York City Income Taxes thereon in any one or all of the years during the period 1986 through the present, similarly situated,

Plaintiffs-Appellants,

-against-

JAMES W. WETZLER and RODERICK G.W. CHU, individually and as present or former NEW YORK STATE COMMISSIONER OF TAXATION AND FINANCE, EDWARD V. REGAN, individually and as COMPTROLLER OF THE STATE OF NEW YORK, ANTHONY SHORRIS, STANLEY E. GRAYSON, ABRAHAM BIDERMAN and PAUL CROTTY, individually and as present or former COMMISSIONER OF FINANCE OF THE CITY OF NEW YORK, and THE CITY OF NEW YORK,

Defendants-Respondents.

ORDER TO SHOW CAUSE

Upon the accompanying affidavit of John J. Phelan, III, Esq. dated the 15th day of August, 1994, upon the Orders and Decisions of the Appellate Division, Second Department dated August 8, 1994, and upon all other papers and proceedings, including the in-Chambers hearing held before me at Court of Appeals Hall at 2 p.m., August 17, 1994, it is

ORDERED that defendants and each of them Show Cause at this Court, to be held at the Court of Appeals Hall, 20 Eagle Street, Albany, New York on the 29th day of August, 1994, why an order should not be entered by the New York State Court of Appeals enjoining and prohibiting the defendants and each of them and their agents, attorneys and employees (i) from making any distribution to members of the putative class that is conditional in any way or seeks a release or any other compromise in return for such payment, (ii) from distributing to plaintiffs and members of the putative class amounts greater than eighty per cent (80%) of their respective claim for refunds for taxes illegally assessed on federal pensions, including interest thereon, (iii) from otherwise interfering with the lien held by Anderson Kill Olick & Oshinsky, P.C., Phelan & Costello, P.C. and O'Neil, Cannon & Hollman, S.C. on the proceeds of such refunds and interest, (iv) from otherwise breaching the fiduciary duties they hold as trustees of a constructive trust of the common fund claimed in this action and (v) for such other and further relief which as to this Court seems just and proper; and it is further

ORDERED, that pending the hearing and determination of enforcement or implementation of the August 8, 1994 Appellate Division order sought to be appealed from be stayed, including that this motion, defendants and each of them and their agents, attorneys and employees be and hereby are temporarily enjoined and prohibited from: taking any unilateral actions, including the mail-

ing or distribution of any refund checks that are the subject of these proceedings or actions that affect or might affect the rights and interests of movants and other potentially affected parties or participants, as part of any unilateral plan, resolution or satisfaction of this long-running, still-pending, complex public tax dispute, without express and particularized Court approval, pending the en banc Court of Appeals' consideration and decision at its next regularly scheduled Session in Albany, New York, commencing Monday August 29, 1994, in conjunction with the Court's consideration and decision of the also pending motion in this case for leave to appeal, also returnable on that date; it is also ordered that the parties maintain the present status quo between them for this additional short period of time inasmuch as this matter has been controverted and pending since 1989 and is before the Courts of this State for implementation by the State courts on a direct Mandate and Order of the United States Supreme Court;

And, SUFFICIENT CAUSE appearing therefore, let service of a copy of this Order by personal service upon the offices of the Attorney General of the State of New York and the Corporation Counsel of the City of New York on or before the close of business, 5 PM, today August 18, 1994, be deemed sufficient; and all other written submissions including on the motion for leave to appeal be served and filed on or before August 24, 1994.

ENTER:

/s/ Joseph W. Bellacosa
Judge
Court of Appeals
Albany, New York

August 18, 1994—1 pm

APPENDIX L

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
Washington, DC 20543

WILLIAM K. SUTER
Clerk of the Court

Area Code 202
479-3011

September 1, 1994

Mr. Mark Weyman
Anderson Kill Olick & Oshinsky
666 Third Avenue
New York, NY 10017

Re: Eugene H. Duffy, et. al.,
v. James Wetzler, et. al.,
Application No. A-157

Dear Mr. Weyman:

The application for a stay pending the filing and disposition of a petition for certiorari in the above-entitled case has been presented to Justice Thomas, who on September 1, 1994 endorsed thereon the following:

"Deny
CT
9/1/94"

Sincerely,
WILLIAM K. SUTER
Clerk

By /s/ Cynthia Rapp
CYNTHIA RAPP
Assistant Clerk

APPENDIX M

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
Washington, DC 20543

September 14, 1994

WILLIAM K. SUTER
Clerk of the Court

Robert Costello
Phelan & Costello, P.C.
665 5th Avenue, 9th Floor
New York, NY 10022

Re: Eugene H. Duffy, et al. v. James Wetzler, et al.
No. 94-157

Dear Mr. Costello:

The Court today entered the following order in the above-entitled case:

"The application for stay addressed to Justice Souter and referred to the Court is denied. Justice Breyer took no part in the consideration or decision of this application."

Very truly yours,

WILLIAM K. SUTER
Clerk

By /s/ Francis J. Lorson
FRANCIS J. LORSON
Chief Deputy Clerk

cc: Denise Hartman
Clerk, Court of Appeals of New York
(Your No. 1103)

Supreme Court, U.S.
FILED
DEC 9 1994
OFFICE OF THE CLERK

No. 94-766

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

EUGENE H. DUFFY, et al.,

Petitioners,

v.

JAMES W. WETZLER, et al.,

Respondents.

BRIEF OF RESPONDENTS CITY OF NEW YORK AND ITS FORMER AND PRESENT COMMISSIONERS OF FINANCE IN OPPOSITION TO A PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW YORK, APPELLATE DIVISION, SECOND JUDICIAL DEPARTMENT

PAUL A. CROTTY
Corporation Counsel of the
City of New York,
Attorney for New York City
Respondents,
100 Church Street,
New York, New York 10007.
(212) 788-0835

EDWARD F. X. HART,*
FRANCES J. HENN,
STANLEY BUCHSBAUM,
of Counsel.
*Counsel of Record.

QUESTIONS PRESENTED

1. Whether the decision of the Supreme Court of the State of New York, Appellate Division, Second Judicial Department, is in accord with this Court's mandate in Duffy v. Wetzler, __U.S.__, 113 S. Ct. 3027 (1993), where full refunds will be paid to all those federal retirees who have filed valid, timely refund claims.

2. Whether the substantive defenses to petitioners' claim for damages under 42 U.S.C. § 1983 are impacted by this Court's decisions in Hafer v. Melo, 502 U.S. 21 (1991), or Collins v. City of Harker Heights, __U.S.__, 112 S. Ct. 1061 (1992), decided subsequent to the trial court's decision in this case.

3. Whether the denial of class certification and attorneys' fees under the common fund theory "thwarts the enforcement of federal rights" under 42 U.S.C. § 1983.

4. Whether the denial of class certification and attorneys' fees under the common fund theory on independent state grounds provides a basis for granting a writ of certiorari.

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STATEMENT OF THE CASE

This action was commenced by petitioners in New York Supreme Court in 1989, seeking declaratory and injunctive relief with respect to their rights under Davis v. Michigan Department of Treasury, 489 U.S. 803 (1989), to refunds of state income taxes paid on their federal pensions. The balance of the relief requested concerned various bids for attorneys' fees disguised as class certification, a claim for damages pursuant to 42 U.S.C. § 1983 and/or attorneys' fee under the common fund doctrine.

On June 27, 1994, the State announced that it would pay full refunds plus interest to those federal retirees who filed timely refund claims. Subsequently, the Appellate Division, Second Department, correctly held that the issues in this case related to refunds are academic. Regarding the remaining issues, the only one involving a question of federal law is petitioners' claim for damages/attorneys' fees pursuant to 42 U.S.C. §§ 1983 and 1988. This issue, as

well as the issues of class certification and common fund attorneys' fees, were correctly decided by the Second Department in respondents' favor. Petitioners' claims of Constitutional violations are completely meritless and these are not otherwise issues of national importance. Consequently, this Court should deny petitioners' application for a writ of certiorari.

In its Memorandum Decision dated April 10, 1990, the Supreme Court, Queens County, held that former § 612(c)(3) of the Tax Law and the corresponding provision of the former Administrative Code of the City of New York were invalid and unconstitutional; respondents were enjoined from assessing and collecting personal income taxes which were still due and owing; and were enjoined from refusing to grant refunds to those taxpayers who had complied with the procedural requirements of the Tax Law for obtaining refunds. Pet. p. 31a-33a, 148 Misc.2d 459, 555 NYS2d 543 (Sup. Ct., Queens Co., 1990).

The Court, however, denied petitioners' application for class certification and dismissed their claims for relief under 42 U.S.C. § 1983 and for monies had and received. Pet. p. 33a-38a, 148 Misc.2d at 464-70, 555 N.Y.S.2d at 546-50. By separate post-judgment orders dated October 1, 1990, the Queens County Supreme Court, inter alia, denied petitioners' motions for renewal and reargument of the motion for class certification and common fund attorneys' fees.

On appeal and cross-appeal, the Second Department issued its Opinion and Order of January 15, 1992, reported at 174 A.D.2d 253, 579 N.Y.S.2d 684, Pet. p. 7a-24a ("Duffy I"), which modified the order and judgment of Supreme Court, Queens County, by deleting those portions of that order and judgment which granted petitioners' declaratory and injunctive relief and, as so modified, affirmed it. Applying the test set forth in Chevron Oil v. Huson, 404 U.S. 97 (1971), the Court held that Davis

should be given only prospective effect. 174 A.D.2d at 264-65, 579 N.Y.S.2d at 691.

The Second Department expressly rejected for independent reasons petitioners' cross-appeals with regard to § 1983 relief and class certification. It agreed with the lower court's rationale for dismissing the cause of action for damages under 42 U.S.C. § 1983, adding that, in any event, respondents are protected by the doctrine of qualified immunity. 174 A.D.2d at 266, 579 N.Y.S.2d at 692. The Court also agreed that class certification was properly denied because, where governmental actions are involved, subsequent plaintiffs are adequately protected under the doctrine of stare decisis and because a claim for tax refund is personal to the taxpayer and does not constitute a protest on behalf of each member of the proposed class, citing Matter of Crociata v. State Tax Commission, 133 Misc. 2d 855, 508 N.Y.S.2d 842 (Sup. Ct., Albany Co., 1986), aff'd on other grounds, 134 A.D.2d 112, 523 N.Y.S.2d 923 (3d

Dept., 1988), aff'd, 73 N.Y.2d 726, 537 N.E.2d 98 (1988); Conklin v. Town of Southampton, 141 A.D.2d 596, 529 N.Y.S.2d 517 (2d Dept., 1988).

In addition, the Second Department explicitly agreed with the lower court's decision regarding the action for money had and received against the City and added that the lower court properly denied petitioners' post-judgment motions seeking, inter alia, renewal or reargument of the denial of class certification and attorneys' fees under the common fund doctrine.

By order dated April 7, 1992, the Court of Appeals of the State of New York, sua sponte, dismissed petitioners' appeal taken as of right pursuant to New York CPLR 5601(b)(1). Pet. p. 51a-52a, 79 N.Y.2d 976, 592 N.E.2d 798 (1992). By order dated July 7, 1992, the Court of Appeals denied petitioners' application for leave to appeal pursuant to New York CPLR 5601(a)(1)(i) and 5514(a). Pet. p. 53a-54a, 80 N.Y.2d 890, 600 N.E.2d 627 (1992).

Petitioners then filed their first petition for certiorari in this Court. While that petition was pending, this Court rendered its decision in Harper v Virginia Department of Taxation, Pet. p. 45a, 509 U.S. ___, 113 S. Ct. 2510 (1993).

On June 28, 1993, this Court vacated the Second Department's decision that Davis should be applied prospectively only and remanded the case "for further consideration in light of Harper". Pet. p. 45a, 509 U.S. _, 113 S. Ct. 3027.

Although respondents on remittitur initially continued to litigate the issue of remedy, the State announced on June 27, 1994, that it would "pay full refunds plus interest to the approximately 10,000 federal retirees who paid State income taxes on their federal pensions prior to 1989 pursuant to tax provisions that were later held to be unconstitutional under [Davis and Harper] and who have

filed timely administrative claims for refunds with the Department of Taxation and Finance."

As a result, the Second Department, in its decision and order dated August 8, 1994, dismissed respondents' appeals, writing, "the issues affected by the remittitur of the United States Supreme Court for further consideration in light of Harper, i.e., those relating to remedy on the potential refunds, are academic". The Second Department also dismissed petitioners' cross appeals, writing that "plaintiffs' contentions regarding the remaining issues, including class action certification and common fund attorneys' fees, were previously rejected by this court in Duffy I, and need not be reexamined". On the same date, by separate decision and order, the Second Department recalled and vacated its prior order dated July 19, 1994, which had granted petitioners' attorneys a temporary restraining order and ordered that the issues regarding the attorneys' right to fees for the petitioners/clients, who had

retained them, and the existence of any charging lien under Judiciary Law § 475 be set down for hearing in Supreme Court, Queens County. Pet. p. 1a-6a, __A.D.2d__, 616 N.Y.S.2d 48.

Petitioners then filed and served a motion for leave to appeal to the Court of Appeals of the State of New York, along with a motion for a preliminary injunction. By order dated August 18, 1994, Judge Bellacosa granted the injunctive relief requested pending review by the full Court (Pet. p. 57a-59a).

On September 1, 1994, the New York Court of Appeals denied petitioners' motion for leave to appeal and vacated the previously entered stay. 84 N.Y.2d 838, 641 N.E.2d 149. Also on September 1, 1994, petitioners filed an application with this Court for a stay pending the petition in this case. That application was denied by Justice Thomas (Pet. p. 60a). The application was renewed to Justice Souter on September 2, 1994, who then referred it to the full

Court. That application was denied on September 14, 1994 (Pet. p. 61a).

POINT I

THE DECISION BELOW IS IN FULL ACCORD WITH THE MANDATE OF THIS COURT IN DUFFY I.

(1)

There is no need to explain the meaning of the mandate of Duffy v. Wetzler, 509 U.S. ____, 113 S. Ct. 3027 (1993), in this forum. It is, however, necessary to describe how the decision of New York Supreme Court, Appellate Division, Second Department, which has been totally mischaracterized by petitioners, is fully consistent with that mandate.

In granting petitioners' first petition for certiorari, this Court remanded Duffy for reconsideration in light of Harper v. Virginia Department of Taxation, 509 U.S. __, 113 S. Ct. 2570 (1993). Petitioners take issue with the Second Department's refusal to reexamine the issues of

class certification, damages under 42 U.S.C. §1983, and common fund attorneys' fees. They argue that, "[i]n light of Harper, the fundamental premise of the Second Department's rulings in Duffy I and therefore Duffy II, has been eliminated." Since Harper did not address the issues of class certification, damages under 42 U.S.C. §1983, or common fund attorneys' fees, this statement could only be valid if the Second Department had ruled in Duffy I that it did not have to address these issues because it had decided not to require that refunds be paid. Even though it was not necessary to address these issues, the first opinion of the Appellate Division did, in fact, discuss liability for damages under §1983 and class certification on the merits. They also specifically affirmed the lower court's denial of the various motions, including the motion for attorneys' fees under the common fund theory. Thus, since the Second Department had examined all of these issues in Duffy I, independent of the refund issue, and since nothing in

Harper was relevant to these issues, the Second Department cannot in any sense be said to have flouted this Court's mandate by refusing to reexamine these issues on remand.

Petitioners argue that the requirement of a "meaningful opportunity" for "relief" sufficient to "satisfy the Due Process Clause of the Fourteenth Amendment", as set forth in Harper and in McKesson Corp. v. Florida Division of Alcoholic Beverages and Tobacco, 496 U.S. 18 (1990), on remand, 574 So. 2d 114 (Fla. 1991), necessarily includes a requirement that a taxpayer's attorneys' fees incurred in connection therewith be paid as well,[1] stating:

> In view of the expenses attendant to prosecuting these actions for relatively small claims, federal constitutional and statutory rights will be eliminated in New York for all but the wealthy. The Due Process Clause and Equal Protection Clause ... and 42 U.S.C. §1983 will each be written in New York to protect only "wealthy" persons rather than all persons. Pet. p.13.

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[1] It does not matter to petitioners whether the vehicle for payment of those fees is class certification, §1983 liability, or the common fund theory.

This interpretation is completely unsupported by even the most expansive reading of Harper and McKesson. Since neither Harper nor McKesson in any sense require that attorneys' fees be paid in connection with a claim for a tax refund, the Second Department decision, effectively denying plaintiffs' various bids for fees, was in no way in conflict with this Court's mandate in Duffy I.

(2)

Petitioners choose to introduce their "Reasons for Granting the Writ" with a series of ten statements, only two of which are direct quotes, which purport to characterize respondents' "war of attrition against federal retirees". Pet. p. 10. To the extent these statements are varied and seemingly contradictory, they merely reflect the state of flux in which the law existed regarding the issues of refunds and/or they are taken out of context.[2] Ultimately, the

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[2] Of course, certain apparent inconsistencies are more a result of inaccurate paraphrasing. For example, the second (continued...)

State decided to pay full State and City refunds, with interest, to all those who had filed timely, valid refund claims. Thus, the present situation is in direct contrast with that presented in Reich v. Collins, __U.S.__, 1994 WL 675214 (U.S.Ga)(1994).

POINT II

CITY RESPONDENTS ARE NOT LIABLE FOR DAMAGES PURSUANT TO 42 U.S.C. §1983.

(1)

Petitioners maintain that, pursuant to this Court's holding on retroactivity enunciated in Harper, the Second Department was obligated to apply this Court's decision in

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[2] (...continued)
"changing" position presented by petitioners alleges that there was a statement in the Utica Observer Dispatch, dated April 14, 1989, to the effect that "Federal retirees could but need not apply for refunds in order to be protected." emphasis supplied. In the article referred to, the State representative repeatedly instructed that protective refund claims should be filed and never used the word "could".

Collins v. City of Harker Heights, 112 S. Ct. 1061 (1992)[3] and Hafer v. Melo, 502 U.S. 21 (1991), which were both decided subsequent to the trial court's decision in Duffy I. However, neither Hafer or Collins could have altered the trial court's holding, affirmed by the Appellate Division, regarding the liability of the City respondents for damages pursuant to 42 U.S.C. §1983.

In Hafer, this Court held that state officials may be sued in their individual capacities pursuant to 42 U.S.C. §1983 and that the Eleventh Amendment does not provide any protection just because of the "official" nature of their acts. The trial court in Duffy I did not hold that the City respondents had immunity because of the official nature of their acts. Rather, it held that the City respondents never "acted" regarding the acts complained of in that New York State is responsible for administering the City's Personal

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[3] Petitioners argue that Collins would have clearly dictated a different result in Duffy II. Yet, it was not even cited in petitioners' briefs on remand.

Income tax, including the granting or denial and payment of refund claims. New York City Administrative Code §11-1797(a).[4]

This Court established in Collins that two questions need to be asked where a §1983 claim is asserted against a municipality. It must be determined whether or not the plaintiff's harm was caused by a constitutional violation and, if so, whether the municipality was responsible for the violation. Collins p. 1063. In the case at bar, the City respondents never acted and, thus, regardless of whether or not there was a violation, the City respondents could not be

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[4] In the City Respondents' Brief on cross-appeal in Duffy I, the City respondents argued that the lack of personal involvement is only a defense in a personal capacity lawsuit. The argument was framed in that manner as a response to an argument in petitioners' brief. As so framed, it would not provide a defense to the City or to the individuals in their official capacity. However, the City respondents asserted the broader argument in the lower court, that they did not and could not have "acted" with respect to the refund claims in question within the meaning of 42 U.S.C §1983.

held responsible for the acts complained of, even under Collins.

Additionally, while it was not part of the trial court's ruling, the City respondents argued and continue to maintain that a violation of 4 U.S.C §111 is not actionable under 42 U.S.C. §1983. Dennis v. Higgins, 498 U.S. 439 (1991); Golden State Transit Corp. v. Los Angeles, 493 U.S. 103 (1989).

Finally, the grounds advanced by the trial court and affirmed by the Second Department for rejecting relief under §1983 are not vitiated simply because one aspect of the Court's dicta does not apply. The Second Department stated in dicta that, in addition to the grounds for rejection given by Special Term, qualified immunity would also be enough to reject plaintiffs' claim. Admittedly, such a defense would not bar an action against a municipality. Owen v. City of Independence, 445 U.S. 622 (1980), reh'g denied, 446 U.S. 992 (1980).

In attempting to present the issue of class certification to this Court for review, where it is otherwise a non-reviewable question of state procedural law, petitioners assert that the denial of class certification by the court below is "inconsistent in both purpose and effect with the remedial objectives of the federal civil rights law", citing Felder v. Casey, 487 U.S. 131, 153 (1988). In further support of this proposition, the petitioners also cite Garrett v. Bamford, 538 F.2d 63, 71 (3d Cir., 1976), cert. denied, 429 U.S. 977 (1976), where the Court held that a suit could be brought against the state in federal court despite the Tax Injunction Act because a class action was not available in the state courts.

The petitioners, however, chose to initiate suit in the state courts and the general rule is that "federal law takes the state courts as it finds them." Howlett v. Rose, 496 U.S. 356 (1990). Felder and Howlett represent narrow exceptions to this general rule. Felder involved a notice of

claim prerequisite; Howlett a state law sovereign immunity defense. In both cases, the state law in question was "outcome - determinative", Felder, supra, 487 U.S. at 151, that is, the application of the state statute could prohibit someone from prevailing in the §1983 litigation in question. In the case at bar, New York's class action statute only prohibits the §1983 litigation from proceeding as a class action. Nothing in the New York Civil Practice Law and Rules prevents individual litigants from either initiating their own litigation or waiting for the outcome of one lawsuit, where the government entity automatically applies the ruling to those similarly situated under the doctrine of stare decisis.

POINT III

THE CLASS CERTIFICATION AND COMMON FUND ATTORNEYS' FEES ISSUES WERE BOTH PROPERLY DECIDED BY THE COURTS BELOW. MOREOVER, THE DENIAL OF CLASS CERTIFICATION AND COMMON FUND ATTORNEYS' FEES DOES NOT PROVIDE A BASIS FOR GRANTING A WRIT OF CERTIORARI.

(1)

The Second Department's decision regarding class action certification is entirely consistent with New York case law in this area. New York has repeatedly held that class action certification is inappropriate in a case involving governmental actions since subsequent plaintiffs will be adequately protected under the doctrine of stare decisis. Rivers v. Katz, 67 N.Y.2d 485, 495 N.E.2d 337 (1986); Matter of Dumbleton v. Reed, 40 N.Y.2d 586, 589, 357 N.E.2d 363, 365 (1976); Martin v. Lavine, 39 N.Y.2d 72, 75, 346 N.E.2d 794, 795 (1976); Brady v. State of New York, 172 A.D.2d 17, 25, 576 N.Y.S.2d 896, 900 (3rd

Dept., 1991) aff'd on other grounds, 80 N.Y.2d 596, 607 N.E.2d 1060 (1992), cert. denied, __U.S.__, 113 S. Ct. 2998 (1993); Gandolfi v. City of Yonkers, 101 A.D.2d 188, 198-199, 475 N.Y.S.2d 429, 435-436 (2d Dept., 1984), aff'd. for reasons stated in opinion below, 62 N.Y.2d 995, 468 N.E.2d 699 (1984); Conklin v. Town of Southampton, 141 A.D.2d 596, 529 N.Y.S.2d 517 (2d Dept., 1988).

Regarding the issue of attorneys' fees under the common fund theory, it is true that New York courts have recognized the common fund doctrine as an exception to the American rule of not awarding attorneys' fees to the prevailing party. We are aware of no case, however, in which a New York court has awarded attorneys' fees in a tax refund suit. New York courts, moreover, have focused on the limitation of a court's power to award attorneys' fees in cases where a fund is created by operation of stare decisis, holding that such an award is warranted only in

exceptional cases. Realty Equities v. Gerosa, 30 Misc. 2d 481, 489-491, 209 N.Y.S.2d 446, 458 (Sup. Ct., N.Y. Co., 1960), citing Sprague v. Taconic Bank, 307 U.S. 161 (1939). Thus, both class certification and the issue of attorneys' fees under the common fund theory were correctly decided and consistent with the law in New York.

(2)

This Court has repeatedly held that it will not review state court judgments which are based upon adequate and independent state grounds, that is, it will only review state court judgment to the extent that they incorrectly adjudicate federal rights. See, e.g., Herb v. Pitcairn, 324 U.S. 117, 125-126 (1945). Petitioners go to great lengths to link the denial of class certification and common fund attorneys' fees, otherwise purely questions of state procedural law, to a federal right, thereby attempting to confer jurisdiction on this Court. First, petitioners allege that the denial of class certification and common fund attorneys' fees conflicts with

the holdings of this Court, citing Deposit Guarantee National Bank v. Roper, 445 U.S. 326 (1980). In Deposit Guaranty this Court extolled the virtues of class certification and held that its denial is appealable even after final judgment. Deposit Guarantee at 338-339. Respondents do not dispute the merits of class certification in appropriate circumstances. Nor is it alleged that petitioners do not have the right to appeal the lower court's denial merely because final judgment has been entered.[5] Respondents argue instead that the trial court and the Second Department properly applied state law to a state procedural issue, which does not otherwise affect a federal right within the meaning of this Court's holdings. In contrast, Deposit Guarantee

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[5] In this regard, petitioners quote the Second Department for petitioners' inference that the Court held the appeal of the denial of class certification to be "academic". Pet. p. 22. While the Second Department did determine the refund issue to be "academic" in light of the State's decision to pay refunds, it did not state that the appeal of the denial of class certification was academic, but rather that it need not reexamine that issue.

involved class certification pursuant to the Federal Rules of Civil Procedure.

Next, petitioners argue that denial of class certification extinguishes "the due process rights of plaintiffs to share the financial burden in prosecuting this claim pursuant to the class action statute ...". Pet. p.23. While this Court has looked favorably upon class actions as a vehicle to ease these "financial burdens", Deposit Guarantee, it has never referred to this procedural device as a "right" protected by the due process clause.[6]

Finally, petitioners refer to the policy reasons why this Court should review the denial of class certification and attorneys' fees. As this Court is well aware, the policy concerns go both ways. Deposit Guarantee, at p. 339. New York case law holds that in cases such as the present, the good policy promoted by denying class certification and

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[6] Obviously, if attorneys' fees were guaranteed by the Due Process Clause, there would be no need for the numerous statutory attorneys' fee provisions.

common fund attorneys' fees outweighs any of the policy arguments in favor of certifying the class and awarding fees. Unless plaintiffs can assert a valid federal right denied by the denial of class certification or attorneys' fees, they have not asserted adequate grounds for this court to exercise its powers of review.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

December 9, 1994.

Respectfully submitted,

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(3)

No. 94-766

FILED

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OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

October Term, 1994

EUGENE H. DUFFY, *et al.*,

Petitioners,

against

JAMES W. WETZLER, *et al.*,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK SUPREME COURT APPELLATE DIVISION --

BRIEF FOR RESPONDENTS WETZLER, CHU AND REGAN IN OPPOSITION

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Questions Presented

1. Whether the court below complied with the mandate of this Court to reconsider its prior decision in light of *Harper v Virginia Department of Taxation.*

2. Whether the decision of the court below denying relief under 42 USC § 1983 violates the Supremacy Clause.

3. Whether the decision of the court below denying class action certification and attorneys' fees under the common fund doctrine conflicts with this Court's decisions by depriving taxpayers of meaningful relief required by the Due Process Clause.

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No. 94-766

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994.

EUGENE H. DUFFY, et al.,

Petitioners,

against

JAMES W. WETZLER, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK SUPREME COURT APPELLATE DIVISION --

Brief for Respondents Wetzler, Chu and Regan in Opposition

Opinions Below

The opinion of the New York State Supreme Court, Appellate Division (Pet App 1a-4a) is reported at ____ AD2d

____, 616 NYS2d 48 (2d Dept August 8, 1994) ("Duffy II"). The New York State Court of Appeals' denial of petitioner's motion for leave to appeal (Pet App 46a) is reported at 84 NY2d 838, 617 NYS2d 129, 641 NE2d 149 (Sept. 1, 1994).

Previously, the Appellate Division had issued a decision (Pet App 7a-24a), reported at 174 AD2d 253, 579 NYS2d 684 ("Duffy I"), affirming in part and reversing in part a decision of the Supreme Court of the State of New York, Queens County. The opinion of the New York State Supreme Court, Queens County (Pet App 25a-38a), is reported at 148 Misc 2d 459, 555 NYS2d 543. The orders of the New York State Court of Appeals dismissing petitioners' appeal in *Duffy I* (Pet App 51a-52a) and denying petitioners' motion for leave to appeal *Duffy I* (Pet App 53a-54a) are reported respectively at 79 NY2d 976, 583 NYS2d 190, 592 NE2d 798, and 80 NY2d 890, 587 NYS2d 900, 600 NE2d 627 (1992). This Court, in its order dated June 28, 1993 (Pet App 45a), reported at ____ US ____, 113 S Ct 3027, 125 L Ed 2d 716, had granted the prior petition for certiorari to the Appellate Division in *Duffy I*, vacated that judgment, and remanded the case to the Appellate Division for further consideration in light of *Harper v Virginia Department of Taxation*, 509 US ____, 113 S Ct 2510, 125 L Ed 2d 74 (1993).

Jurisdiction

The decision and order of the Appellate Division was entered on August 8, 1994. The denial by the New York State Court of Appeals of petitioners' motion for leave to appeal pursuant to sections 5602(a)(1)(i) and 5514(a) of the New York Civil Practice Law and Rules was dated Septem-

ber 1, 1994. The jurisdiction of this Court is invoked under 28 USC § 1257(a).

Statement of the Case

This case stems from this Court's decision in *Davis v Michigan Department of Treasury*, 489 US 803 (1989), holding that state income tax laws which exempt from taxation retirement benefits paid by the state or its political subdivisions while taxing retirement benefits paid by all other employers including the federal government violates the principles of intergovernmental tax immunity embodied in 4 USC § 111. New York immediately acted to conform its tax laws to the *Davis* ruling, amending section 612(c)(3) of the Tax Law to exclude from taxation pensions paid to former officers and employees of the federal government. L 1989, ch 664, §§ 1, 2. The amendment was made applicable to federal pension benefits received in taxable years beginning on or after January 1, 1989. L 1989, ch 664, § 3.[1] Petitioners in this case seek declaratory, injunctive and monetary relief for taxes paid on federal pensions prior to 1989.

In June of this year, in light of this Court's decision in *Harper v Virginia Department of Taxation*, 509 US ____, 113 S Ct 2510, 125 L Ed 2d 74 (1993), which held that *Davis* must be applied retroactively, and in view of changes in New York's fiscal situation, the Governor of New York announced that the State would pay full refunds plus interest to the approximately 10,000 federal retirees who had filed timely administrative claims for refunds for the years 1985

[1]Corresponding provisions in section 11-1712(c)(3) of the New York City Administrative Code were also amended to conform to the *Davis* ruling.

through 1989.[2] As the Appellate Division held, the State's decision to pay these refunds rendered academic the principal issues of retroactivity and remedy which had been litigated throughout this case. Petitioners now seek a writ of certiorari primarily as a further step in their quest for attorneys' fees. While they ostensibly raise other arguments that New York's procedures violate Due Process and Supremacy Clause principles, these other arguments are plainly meritless. As the following discussion shows, there is no reason for this Court to grant petitioner's application for a writ of certiorari.

Two months after this Court decided *Davis*, petitioners commenced this action against various New York State and City officials, and the City of New York, in New York Supreme Court, Queens County, seeking declaratory, injunctive and monetary relief under state and federal law. In their second amended complaint, petitioners alleged as a first cause of action under 42 USC § 1983 that the pre-1989 New York State and City tax laws violated their rights under 4 USC § 111, principles of intergovernmental tax immunity, and the Due Process and Equal Protection Clauses of the United States Constitution. As a second cause of action, petitioners sought a declaration that section 612(c)(3) of the Tax Law and section 11-1712(c)(3) of the New York City Administrative Code violated these same constitutional and statutory provisions. As a third cause of action, petitioners sought an injunction against the State and City respondents to prevent them from continuing to collect taxes on federal pensions for the years 1986 through 1989. Petitioners al-

[2]Under New York Tax Law § 687, a taxpayer must file an administrative claim for a refund within three years of the time of filing the taxpayer's return or two years from the time the tax was paid, whichever occurs later.

leged as a fourth and final cause of action that the City of New York is liable for monies had and received. Petitioners also sought class certification. Respondents duly answered and interposed various defenses. Petitioners moved for partial summary judgment on their second cause of action for declaratory relief and renewed a prior application for class certification. Both the State and City respondents cross-moved for summary judgment dismissing the complaint taking the position that *Davis* should be given only prospective effect.

In its Memorandum Decision dated April 10, 1990, Supreme Court, Queens County, reasoned that, regardless of whether *Davis* is to be applied retroactively, New York State law requires refunds (Pet App 31a-33a, 148 Misc 2d 459, 465-66, 555 NYS2d 543, 546-48). The court granted judgment in favor of petitioners declaring that the City and State personal income tax scheme which taxed federal pension benefits received prior to January 1, 1989, while exempting from taxation State and local pension benefits, was discriminatory, invalid and unconstitutional in light of *Davis*, and that petitioners are entitled to refunds of personal income taxes paid on federal pension benefits for the years 1986 through 1988, provided that they file for refunds and meet the procedural requirements for refunds under the Tax Law (Pet App 37a, 148 Misc 2d at 470, 555 NYS2d at 550).[3] The court also enjoined respondents from assessing and collecting personal income taxes on federal pension benefits received in the years 1986 through 1988 and from interfering with petitioners' rights to file for a refund of personal

[3]The State respondents dispute that petitioners, "on behalf of themselves and all others similarly situated, have satisfied all procedural requirements imposed by the New York Tax Law", as asserted in the Petition, page 6, note 3.

income taxes paid on federal benefits for the years 1986 through 1988 (Pet App 35a-36a, 148 Misc 2d at 470, 555 NYS2d at 550).

The court, however, granted respondents' motion to dismiss petitioners' first cause of action for monetary relief under 42 USC § 1983 on the ground that petitioners failed to show that the named State and City respondents had personally engaged in any civil rights violation (Pet App 34a-35a, 148 Misc 2d at 467-69, 555 NYS2d at 548-49). The court also dismissed petitioners' fourth cause of action against New York City for monies had and received because petitioners failed to comply with a State law protest requirement (Pet App 36a-38a, 148 Misc 2d at 469-70, 555 NYS2d at 549-50). Finally, the trial court denied petitioners' motion for class certification because under New York law class relief is generally inappropriate where governmental actions are involved and subsequent petitioners will be adequately protected under the doctrine of *stare decisis* (Pet App 29a-31a, 148 Misc 2d at 464-65, 555 NYS2d at 546). An order and judgment was entered accordingly on June 26, 1990 (Pet App 39a-44a). By order dated October 1, 1990, and entered October 5, 1990, the court denied petitioners' post-judgment motion for attorneys' fees under the common fund doctrine.

On appeal and cross appeals, the Appellate Division issued its Opinion and Order in *Duffy I* on January 15, 1992, reported at 174 AD2d 253, which modified the order and judgment of Supreme Court, Queens County, by deleting those portions of that order and judgment which granted petitioners' declaratory and injunctive relief and, as so modified, affirmed it. The court held that New York law does not require refunds absent an antecedent determination that

Davis is to be applied retroactively (Pet App 13a, 174 AD2d at 258, 579 NYS2d at 687). It then ruled that the appropriate analysis of the prospectivity issue was governed by *Chevron Oil Co. v Huson*, 404 US 97 (1971) (Pet App 13a-20a, 174 AD2d at 259-64, 579 NYS2d at 687-691). Applying the three-pronged *Chevron Oil* analysis, the court held that *Davis* should be given only prospective effect (Pet App 20a, 174 AD2d at 264-65, 579 NYS2d at 690-691).

The Appellate Division expressly rejected for independent reasons petitioners' cross appeal with regard to § 1983 relief and class certification. It agreed with the lower court's rationale for dismissing the cause of action for damages under 42 USC § 1983, adding that, in any event, respondents are protected by the doctrine of qualified immunity (Pet App 22a-23a, 174 AD2d at 266, 579 NYS2d at 691-692). The court also agreed that class certification was properly denied because where governmental actions are involved subsequent petitioners are adequately protected under the doctrine of *stare decisis* and because a claim for tax refund is personal to the taxpayer and does not constitute a protest on behalf of each member of the proposed class, *citing*, *Matter of Crociata v State Tax Commn.*, 133 Misc 2d 855, 508 NYS2d 842 (Sup Ct Albany Co 1986), *affd on other grnds*, 134 AD2d 112, 523 NYS2d 923 (3d Dept), *affd*, 73 NY2d 726, 535 NYS2d 592, 532 NE2d 98 (1988); *Conklin v Town of Southampton*, 141 AD2d 596, 529 NYS2d 517 (2d Dept 1988) (Pet App 22a-23a, 174 AD2d at 266-267, 579 NYS2d at 691-692). The Appellate Division also affirmed the lower court's post-judgment order denying attorneys' fees under the common fund doctrine (Pet App 23a, 174 AD2d at 267, 599 NYS2d at 692).

By order dated April 7, 1992, the New York Court of Appeals *sua sponte* dismissed petitioners' appeal taken as of right pursuant to New York CPLR 5601(b)(1) (Pet App 51a-52a, 79 NY2d 976, 583 NYS2d 190, 592 NE2d 798). By order dated July 7, 1992, the Court of Appeals denied petitioners' application for leave to appeal pursuant to New York CPLR 5602(a)(1)(i) and 5514(a) (Pet App 53a-54a, 80 NY2d 890, 587 NYS2d 900, 600 NE2d 627).

Petitioners then filed a petition for certiorari in this Court. While that petition was pending, the Court rendered its decision in *Harper v Virginia Department of Taxation*, 509 US ____, 113 S Ct 2510, 125 L Ed 2d 74 (1993), holding that as a matter of federal law *Davis* must be given retroactive effect. While the Court in *Harper* reversed the Virginia Supreme Court's decision on that ground, it refused to enter judgment for the taxpayers "because federal law does not necessarily entitle them to a refund." The Court, therefore, remanded the case to the Virginia Supreme Court "for further proceedings not inconsistent" with its opinion. 113 S Ct at 2520, 125 L Ed 2d at 89.

Accordingly, in response to the petition for certiorari in this case, the Court on June 28, 1993, vacated the Appellate Division's decision that *Davis* should be applied prospectively only and remanded the case "for further consideration in light of *Harper*" (Pet App 45a, 113 S Ct 3027, 125 L Ed 2d 716). The Court issued its mandate on July 28, 1993.

Although respondents on remittitur initially continued to litigate the issue of remedy, on June 27, 1994, the State announced that it would "pay full refunds plus interest to the approximately 10,000 federal retirees who paid State

income taxes on their federal pensions prior to 1989 pursuant to tax provisions that were later held to be unconstitutional under [*Davis* and *Harper*] and who have filed timely administrative claims for refunds with the Department of Taxation and Finance".

As a result, the Appellate Division, in its decision and order dated August 8, 1994, from which petitioners seek a writ of certiorari, dismissed respondents' appeals, writing, "the issues affected by the remittitur of the United States Supreme Court for further consideration in light of *Harper*, i.e., those relating to remedy and the potential refunds, are academic" (Pet App 4a, 616 NYS2d at 50). The Appellate Division also dismissed petitioners' cross appeals, writing, "[petitioners'] contentions regarding the remaining issues, including class action certification and common fund attorneys' fees, were previously rejected by this court in *Duffy I*, and need not be reexamined" (Pet App 4a, 616 NYS2d at 50).[4]

Petitioners then filed and served a motion for leave to appeal to the New York Court of Appeals, along with a motion for a preliminary injunction. By order dated August 18, 1994, Judge Bellacosa granted petitioners' application

[4]On the same date, by separate decision and order, the Second Department recalled and vacated its prior order dated July 19, 1994, which had granted plaintiffs' attorneys' application for a temporary restraining order, aimed primarily at protecting their rights to attorneys' fees, enjoining the State from paying more than 80% of the individual refund claims, and ordered that the issues regarding the attorneys' right to fees from the named plaintiff clients who had retained them and the existence of any charging lien under New York Judiciary Law § 475 be set down for hearing in Supreme Court, Queens County.

for temporary injunctive relief, which was again aimed primarily at protecting their rights to attorneys' fees, enjoining the State from paying any refunds, pending review by the full court (Pet App 57a-59a). On September 1, 1994, the New York Court of Appeals denied petitioners' motion for leave to appeal and vacated its previously issued temporary restraining order (Pet App 46a). This Court twice denied petitioners' applications for a stay pending a decision on the petition for writ of certiorari (Pet App 60a-61a).

REASONS FOR DENYING THE WRIT

By paying full refunds plus interest to the approximately 10,000 federal retirees who filed claims with the New York Department of Taxation and Finance for refunds for State income taxes paid on their federal pension within the three-year period prescribed by New York Tax Law § 687, New York has satisfied the dictates of *Davis* and *Harper*. The issues related to 42 USC § 1983 were correctly decided in accordance with settled federal law. The remaining issues regarding class certification and common fund attorneys' fees are issues of state law which were correctly decided by the Appellate Division and in no way implicate federal constitutional protections. Thus, there is no reason for this Court to grant the writ.

Before discussing the reasons for denying the writ, respondents briefly address petitioners' factual assertions (Br, pp 10-11) regarding defendants' alleged "changing positions" in this case. Petitioners' characterization of these alleged "changing positions" plays fast and loose with the facts in the record and indeed refers to facts outside of the record. The State defendants had consistently maintained that New York was not constitutionally required to pay refunds because, under the principles of the retroactivity doctrine and remedial law, neither federal nor state law

requires refunds where there had been longstanding, good faith reliance on the validity of its prior tax law and the fiscal burden of such refunds would be too great. In connection with this argument, respondents had asserted that due process is satisfied because taxpayers, under New York law, have a meaningful opportunity to challenge the tax in an action for declaratory and/or injunctive relief prior to payment of the taxes.

Moreover, the State respondents have never departed from their position that, even if federal and state law requires backward-looking relief in this case, only those taxpayers who have filed timely individual claims for refunds with the New York State Department of Taxation and Finance would be entitled to refunds. This is consistent with the longstanding statutory provisions found at sections 686 and 687 of the New York Tax Law. In this regard, the Court's decision of December 6, 1994 in *Reich v. Collins*, ____ US ____ (No. 93-908), has no implications whatsoever for this case.

ARGUMENT

POINT I

THE APPELLATE DIVISION FULLY COMPLIED WITH THE MANDATE OF THE COURT TO RECONSIDER ITS PRIOR DECISION IN LIGHT OF *HARPER*.

Petitioners' assertion that the decision below flouts this Court's mandate is flatly wrong and provides no basis for granting a writ of certiorari. The Appellate Division's decision and order of August 8, 1994, reflects no misunderstanding or flouting of the United States Supreme Court's order

and mandate remitting the case for "further consideration in light of *Harper*". Furthermore, in the Appellate Division's prior decision of January 15, 1992, it had rejected petitioners' arguments regarding § 1983 relief, class certification and common fund attorneys' fees based on well-settled principles of federal and state law independent of the remedial issues addressed in *Harper*. The Appellate Division correctly concluded that *Harper* did not alter these well-settled principles of law and that there was no need to reexamine those aspects of its prior decision.

This Court's decision in *Harper* basically addressed two issues. First, the Court's principal holding was that the federal rule against the use of selective prospectivity requires as a matter of federal choice law of principles that *Davis v Michigan Department of Treasury*, 489 US 803 (1989), be applied retroactively. *Harper*, 113 S Ct at 2516-18, 125 L Ed 2d at 84-87. The Court also rejected Virginia's argument that its state court decision rested on the independent state retroactivity principles explaining that the Virginia court had rested its decision on *Davis*. The Court did not rule, however, that the State could not deny relief based on other independent state or federal grounds.

Indeed, the Court expressly recognized that the State could deny refunds: "We do not enter judgment for [the taxpayers], however, because federal law does not necessarily entitle them to a refund. Rather, the Constitution requires Virginia 'to provide relief consistent with federal due process principles'". 113 S Ct at 2519, 125 L Ed 2d at 88. In particular, the Court reaffirmed its holdings in *American Trucking Assns., Inc. v Smith*, 496 US 167 (1990), and *McKesson Corp. v Division of Alcoholic Beverages & Tobacco*, 496 US 18, 39-40 (1990), that if a state offers a meaningful opportunity for taxpayers to withhold their contested tax assessments and to challenge their validity in a

predeprivation hearing due process does not require the State to offer post-deprivation relief. *Harper*, 113 S Ct at 2519-20, 125 L Ed 2d at 88-89. The Court, therefore, remanded the case to the Virginia courts to determine whether Virginia provided an adequate predeprivation remedy and to craft an appropriate remedy accordingly. 113 S Ct at 2520, 125 L Ed 2d at 89. The Court in *Harper* did not make even the mildest allusion to issues such as class certification, attorneys' fees, or traditional prerequisites to relief under 42 USC § 1983.

Petitioners argue (Br, pp 12-13) that because they included two "Questions Presented" in their application for the writ in *Duffy I*, the first being whether *Davis* must be applied retroactively, and the second being "[w]hether an action brought under 42 USC § 1983 in a state court may be defeated by the assertion of state procedural and substantive defenses, where such defenses would not be available if the action had been brought in a federal forum", this Court's mandate vacating the Appellate Division's order and remitting it for further consideration required that court to reconsider expressly all aspects of its prior decision. Petitioners, however, ignore the phrase in the mandate remanding the case for further reconsideration "in light of *Harper*" (Pet App 45a). Furthermore, in the text of their prior petition explicating the proposed question presented (pp 22-23), petitioners asserted that the Appellate Division's decision with regard to the § 1983 cause of action and class certification conflicted with *Hafer v Melo*, 502 US 21 (1991) (holding that a state official acting in his or her official capacity can be held personally liable under 42 USC § 1983); *Howlett v Rose*, 496 US 356 (1990) (holding that school board could not assert state law sovereign immunity defense to defeat § 1983 claim) and *Felder v Casey*, 487 US 131 (1988) (holding that notice-of-claim provision of state law could not be used to defeat federal rights in a non-tax case).

Aside from the fact that these alleged conflicts may not have even been "fairly included" within the second "Question Presented," *see*, Supreme Court Rule 14.1(a); Stern, Gressman, Shapiro & Geller, *Supreme Court Practice*, 7th ed., pp 338-339, this Court did not remand the case for further consideration in light of *Hafer*, *Howlett* or *Felder*. It did so only "in light of *Harper*" (Pet App 45a). Additionally, the issue of common fund attorneys' fees was nowhere addressed in either the petition for certiorari or the *Harper* decision.

Thus, the Appellate Division on remittitur for further consideration in light of *Harper* was required to consider the issues of remedy and the adequacy under the Due Process Clause of the State's predeprivation procedures if the refunds could be denied under State law. There was no directive requiring it to reconsider the other aspects of the decision which rested on independent grounds as they were wholly unaffected by *Harper*. This is not to say that the Appellate Division could not have reconsidered any or all aspects of its prior decision; simply, it was not required to do so. In sum, the Appellate Division did not contravene this Court's mandate.

POINT II

THE APPELLATE DIVISION CORRECTLY DECIDED THE ISSUES RELATED TO PETITIONERS' RIGHT TO RELIEF UNDER 42 USC § 1983 BASED ON WELL-SETTLED PRINCIPLES OF FEDERAL LAW. ITS DECISION IN THIS REGARD PROVIDES NO BASIS FOR GRANTING THE WRIT.

The Appellate Division in its January 15, 1992 decision had upheld the trial court's dismissal of petitioners' cause of action under 42 USC § 1983 on the ground that (1) an action

for damages may not be maintained against the State of New York or the State respondents in their official capacities; and (2) petitioners failed to show how any of the named respondents were personally involved in the collection and assessment of their personal income taxes and that the fact that they were or are in a high position is insufficient to impose personal liability. *Duffy I* (Pet App 22a-23a, 174 AD2d at 266, 579 NYS2d at 692, *affg*, 148 Misc 2d at 468-69, 555 NYS2d at ____). Additionally, the court observed "that the defense of qualified immunity, which the [trial] court did not reach * * * provided a much simpler basis on which to reject the claims." *Duffy I*, Pet App 22a, 174 AD2d at 266, 579 NYS2d at 692. The court went on to state the clearly established principle that government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known, quoting, *inter alia*, *Harlow v Fitzgerald*, 457 US 800, 818 (1982). Indisputably, the Appellate Division's decision, resting as it did on principles of Eleventh Amendment and qualified immunities and the role of respondeat superior in § 1983 actions were not in any way implicated by *Harper*.

The claim against the State defendants in their official capacities was correctly dismissed. In *Will v Michigan Department of State Police*, 491 US 58, 71 (1989), this Court pronounced that with respect to a suit for retroactive relief[5]

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[5]Because the State of New York immediately conformed its Tax Law and the corresponding provisions of the City's Administrative Code to *Davis*, L 1989, ch 664, petitioners here cannot argue that they are seeking prospective relief under § 1983. The new law became effective for the tax year beginning January 1, 1989. *Davis* was decided on March 28, 1989.

"neither a State nor its officials acting in their official capacities are 'persons' under § 1983". Moreover, Eleventh Amendment jurisprudence precludes a suit against the State or State officials which will result in a retroactive award of monetary damages paid from the State treasury, even where plaintiffs attempt to style their claim otherwise. *See, Green v Mansour*, 474 US 64, 73 (1985); *Pennhurst State School & Hosp. v Halderman*, 465 US 89 (1984); *Edelman v Jordan*, 415 US 651, 663, 667-69 (1974).

To the extent that petitioners' section 1983 claim seeks damages against defendants in their individual capacities, it is well established that defendants cannot be held individually liable absent personal involvement in the alleged deprivation. There was no personal involvement on the part of defendants in any alleged wrongdoing against these plaintiffs. Each of these plaintiffs submitted self-assessing personal income tax returns and voluntarily paid their taxes during the years in question. Aside from the mere processing of these returns and payments, there was no involvement whatsoever of anyone from the State, let alone these defendants, in collecting or assessing taxes on plaintiffs' Federal pensions. Nor could defendants having participated in the denial of any refund claims submitted by plaintiffs, since plaintiffs did not file claims with the Department of Taxation and Finance until long after commencement of this action. Furthermore, defendant Regan, as head of the New York Department of Audit and Control, was authorized under state law to issue tax refunds only upon certification of the Commissioner of Taxation and Finance. Tax Law § 686. No such certification had been made with regard to refunds for taxes paid on federal pensions.

Petitioners' reliance (Br, pp 15-16) on *Hafer v Melo*, 502 US 21 (1991), where this Court held that a state official may in some circumstances be held personally liable for damages under 42 USC § 1983 even for actions taken in his or her official capacity, is misplaced. As discussed above, the Appellate Division did not in any way rely on principles inconsistent with the *Hafer* ruling in determining that defendants were not personally involved.

The Appellate Division properly held that respondents would, in any event, be protected under the doctrine of qualified immunity. More than a score of states had similar laws, many in effect for some fifty years before the Supreme Court issued its ruling in *Davis*. *Davis* was clearly a case of first impression; there had been no prior judicial ruling in the federal or state courts that similar tax provisions violated the doctrine of intergovernmental tax immunities. Indeed, in addition to New York's appellate court, several other courts in *Davis*-related cases have also ruled that the tax officials are protected by qualified immunity. *See, e.g., Swanson v Powers*, 937 F2d 965 (4th Cir 1991), *cert. denied*, ____ US ____, 112 S Ct 871, 116 L Ed 2d 777 (1992); *Brumley v Utah State Tax Commn.*, 868 P2d 796, 800-801 (1993); *Bohn v Wadell*, 164 Ariz 74, 790 P2d 772 (Ariz Tax 1990), *vacated on other grnds*, 174 Ariz 239, 848 P2d 324 (1992), *cert. denied*, ____ US ____, 113 S Ct 3000, 125 L Ed 2d 693 (June 21, 1993). Again, the Appellate Division's decision in this regard involves a straightforward application of settled principles of the federal law of qualified immunity.

POINT III

THE APPELLATE DIVISION CORRECTLY DECIDED THE ISSUE OF PETITIONERS' APPLICATION FOR CLASS CERTIFICATION AND COMMON FUND ATTORNEYS' FEES BASED ON WELL-SETTLED PRINCIPLES OF STATE LAW WHICH IN NO WAY CONFLICT WITH DECISIONAL LAW OF THE UNITED STATES SUPREME COURT.

The Appellate Division held that the trial court had properly denied petitioners' application for class certification, writing (Pet App 22a, 174 AD2d at 266, 579 NYS2d at 692):

> "It is well settled that class action certification is inappropriate in a case such as this where governmental actions are involved and subsequent plaintiffs will be adequately protected under the doctrine of stare decisis" (*Duffy v Wetzler*, 148 Misc 2d 459, 464, *supra*, citing *Matter of Crociata v State Tax Commn.*, 133 Misc 2d 855, *affd* 134 AD2d 112, *affd* 73 NY2d 726; *Conklin v Town of Southampton*, 141 AD2d 596). Nothing in the record at bar justifies a departure from this rule.

The Appellate Division's decision based solely on state law[6] was unaffected by *Harper* which in no way dealt with the issue of class certification. The Supreme Court's remittitur in this case for further consideration in light of *Harper* clearly did not require or even warrant reconsideration of the class certification aspect of the decision.[7]

[6]Under New York Civil Practice Law and Rules § 901(a)(5), a class action may be certified only if "a class action is superior to other available methods for the fair and efficient adjudication of the controversy". As a rule, a class action will not be the superior method where governmental operations are involved and where subsequent petitioners will be adequately protected under the principle of stare decisis. *Rivers v Katz*, 67 NY2d 485, 499, 504 NYS2d 74, 81, 495 NE2d 337, 344 (1986); *Matter of Martin v Lavine*, 39 NY2d 72, 75, 382 NYS2d 956, 957, 346 NE2d 794, 795 (1976); *Matter of Jones v Berman*, 37 NY2d 42, 57, 371 NYS2d 422, 432-433, 332 NE2d 303, 311 (1975); *Matter of Rivera v Trimarco*, 36 NY2d 747, 749, 368 NYS2d 826, 827, 329 NE2d 661, 661-662 (1975); *Gonzalez v Blum*, 96 AD2d 1091, 1092, 467 NYS2d 58, 59 (2d Dept 1983); *Matter of Crociata v State Tax Comm'n*, 133 Misc 2d 855, 857, 508 NYS2d 842, 843 (Sup Ct Albany Co 1986), *affd on other grounds*, 134 AD2d 112, 523 NYS2d 923 (3d Dept), *affd*, 73 NY2d 726, 535 NYS2d 592, 532 NE2d 98 (1988). New York law is clear that class action certification is particularly inappropriate in a lawsuit seeking to establish a right to tax refunds because such a claim is "personal to the taxpayer" and those who fail to file a protest or, in this case, a claim for a refund may not enhance their right to a refund through the use of a class action. *See, Brady v State of New York*, 172 AD2d 17, 25, 576 NYS2d 896, 900 (3d Dept 1991), *affd on other grounds*, 80 NY2d 596, 592 NYS2d 955, 607 NE2d 1060 (1992), *cert. denied*, ____ US ____, 113 S Ct 2998, 125 L Ed 2d 692 (1993); *Gandolfi v City of Yonkers*, 101 AD2d 188, 198-199, 475 NYS2d 429, 435-436 (2d Dept 1984), *affd*, 62 NY2d 995, 479 NYS2d 517, 468 NE2d 699 (1984); *Garden City Center Assoc. v Board of Assessors*, 153 AD2d 667, 669, 545 NYS2d 184, 186 (2d Dept 1989), *appeal dismissed*, 75 NY2d 805, 552 NYS2d 104, 551 NE2d 597 (1990).

[7]Virginia does not have a class action statute and the issue whether class relief is necessary was never raised before the Supreme Court in *Harper*.

Petitioners' argument (Br, pp 19-23) that the failure to award class certification conflicts with the United States Supreme Court's mandate because it provides a total procedural obstacle to the vindication of federal rights is wholly without merit. The Supreme Court in *Harper* clearly reaffirmed that, so long as a State's procedures satisfy due process, failure to comply with them can provide a complete defense to refund claims, *citing*, *McKesson Corp. v Division of Alcoholic Beverages & Tobacco*, 496 US 18, 39-40. In *McKesson*, the Court had held that where a state has given an individual taxpayer a meaningful opportunity to challenge a tax prior to payment, it need not provide post-deprivation relief at all. The Court wrote, in answer to the States' concerns regarding their legitimate interest in sound fiscal planning, "in the future, States may avail themselves of a variety of procedural protections against any disruptive effects of a tax scheme's invalidation, such as providing by statute that refunds will be available to only those taxpayers paying under protest, or enforcing relatively short statutes of limitations applicable to refund actions." *McKesson*, 496 US at 50. This holding is determinative of plaintiffs' argument that the Supremacy Clause requires that class certification be granted to protect those who had not filed administrative claims for refunds within the relatively long three-year statute of limitations contained in section 687 of the New York Tax Law.

Petitioners' reliance (Br, pp 22-23) on *Felder v Casey*, 487 US 131 (1988), which held state notice-of-claim provisions inapplicable to § 1983 actions, is misplaced. That was not an action for a tax refund. The Supreme Court in *McKesson* has expressly sanctioned the requirement that a taxpayer file an individual protest or claim even under a short statute of limitations. The point is that, here, plaintiffs

commenced this action in state court, not federal court, and the State has the "unassailable" right to "establish the rules of procedure governing litigation in their own courts" so long as they do not effectively defeat federal rights. *Felder*, 487 US at 138. In light of *McKesson*, it cannot be said that the rejection of the use of the class action mechanism to obviate the administrative procedures required to be followed under state law effectively defeats any federal rights.

In any event, we note that as a procedural matter the issue whether the class action mechanism can be used to toll the statute of limitations is not properly before this Court because petitioners have waived that issue. Petitioners did not challenge that part of the order and judgment of New York Supreme Court, Queens County, which awarded a declaration that taxpayers are entitled to a refund of that portion of their personal income taxes which was paid on federal pension benefit for the years 1986 through 1988, "provided that they file for a refund and meet the procedural requirements for a refund under the tax law" (Pet App 43a). Petitioners' notice of appeal to the Appellate Division expressly limited their appeal from that order and judgment to those aspects that dismissed their claims under § 1983 and for monies had and received and denied their class certification issue. *See*, Record on Appeal to Appellate Division, Docket No. 90-800, pp 7-8. The appeal on the class certification issue cannot be used to enlarge the substantive rights granted by the trial court absent an appeal of the decision on the substantive rights.

Petitioners also erroneously argue that their inability to obtain attorneys' fees under the common fund doctrine deprived them of meaningful backward-looking relief required by the Constitution. The Appellate Division correctly

affirmed the post-judgment order of Supreme Court, Queens County, denying petitioners' attorneys' post-judgment motion for attorneys' fees under the common fund doctrine. The rule in New York, as it is throughout the United States, is that parties are ordinarily required to bear their own costs in litigation. *Alyeska Pipeline Serv. Co. v Wilderness Society*, 421 US 240, 247-259 (1975); *Mighty Midgets, Inc. v Centennial Ins. Co.*, 47 NY2d 12, 21-22, 416 NYS2d 559, 563-564, 389 NE2d 1080, 1084 (1979); *Feeney v Licari*, 131 AD2d 539, 516 NYS2d 265 (2d Dept 1987). Although the judicially created doctrine of common fund attorneys' fees has been used in New York, it has been done only sparingly under narrow circumstances not present in this case.

Here, the key prerequisites for granting common fund attorneys' fees are missing. First, there is no common fund over which the courts have jurisdiction. This is an action for declaratory and injunctive relief; petitioners' may obtain refunds from the State treasury through the filing of administrative claims under section 687 of the Tax Law. Additionally, the common fund doctrine authorizes attorneys' fees only to the extent that the recipients of an award benefit from the attorneys' efforts. Here, the vast majority of the administrative refund claims that have been filed were filed independently, some before this lawsuit was even commenced. These taxpayers are the beneficiaries largely of the efforts of the attorneys who litigated *Davis* and *Harper*, more so than the efforts of the attorneys in this case.

What petitioners' arguments boil down to is that there is a constitutional requirement that the State of New York provide for attorneys' fees in taxpayers' refund actions. This argument is ludicrous. Taxpayers are clearly not precluded

from redress for alleged constitutional injuries merely because there is no state law mechanism for attorneys' fees. This case illustrates by example that redress can be pursued without authorization for attorneys' fees. In addition to the four plaintiffs whom they represent in this action, approximately 650 named plaintiffs are represented by the same counsel in *Alderman v Wetzler*, No. 6193/91 (Sup Ct NY Co), an action raising precisely the same issues which is being held in abeyance in New York County Supreme Court pending the resolution of this case. Presumably, counsel has a fee arrangement with each of these individuals.

In sum, petitioners' argument that their inability to obtain class certification and common fund attorneys' fees denies them meaningful backward-looking relief is wholly meritless. That argument does not provide a basis for granting a writ of certiorari.

CONCLUSION

THE WRIT SHOULD BE DENIED.

Dated: Albany, New York
December 8, 1994

Respectfully submitted,

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No. 94-766

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

EUGENE H. DUFFY, *et al.*,
Petitioners,

v.

JAMES W. WETZLER, *et al.*

On Petition for a Writ of Certiorari to the Supreme Court of New York Appellate Division-Second Judicial Department

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* AND BRIEF *AMICI CURIAE* OF THE NATIONAL ASSOCIATION OF RETIRED FEDERAL EMPLOYEES, THE MILITARY COALITION AND DESIGNATED FEDERAL RETIREES IN ARIZONA, NORTH CAROLINA, VIRGINIA AND WISCONSIN IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE*

The National Association of Retired Federal Employees ("NARFE"), the Military Coalition and designated federal retirees in Arizona, North Carolina, Virginia and Wisconsin move for leave to file a brief *amici curiae* in support of petitioners. Counsel for respondents refused to consent to the filing of this brief.

NARFE is a nonprofit incorporated association having its principal place of business in Washington, D.C. From its original fourteen charter members, NARFE has grown to a membership of approximately a half a million federal annuitants (retirees and survivors) living throughout the Nation and in various foreign countries. NARFE has been a major advocate in maintaining the integrity of the federal government's civilian retirement systems and it has been directly involved, through lobbying and related ac-

tivities, in all legislative and executive changes in these systems over the past six decades.

While NARFE principally focuses on legislative and administrative issues affecting federal retirees, on a handful of occasions, either directly or as *amicus,* NARFE has been involved in litigation in this Court. Most recently, NARFE has been involved in the litigation emanating from the states' discriminatory taxation of federal retirement benefits. Because this discriminatory taxation practice was widespread, NARFE participated as *amicus* in *Davis v. Michigan Department of Treasury,* 489 U.S. 803 (1989). Similarly, NARFE members brought the case of *Harper v. Virginia Department of Taxation,* 113 S. Ct. 2510 (1993), which challenged states' reliance on nonretroactive decisionmaking to deny refunds to federal retirees who had paid the taxes invalidated by *Davis.* NARFE also participated as an *amicus* in the recently-decided case of *Reich v. Collins,* No. 93-908 (Dec. 6, 1994).

This case raises questions virtually identical to those posed in *Reich*: whether the Fourteenth Amendment prohibits states from constantly shuffling and reshuffling the remedies that putatively are available to vindicate unconstitutional state taxation. The majority of the 23 states that imposed *Davis*-type taxes have now refunded (or agreed to refund) those taxes to the federal retirees. Several states, however, are continuing their efforts to avoid their obligations to refund the taxes they unconstitutionally imposed on federal retirees. NARFE and its members in these remaining states are vitally interested in seeing that this litigation is finally put to rest and that refunds are finally paid. Moreover, because the issues raised in this petition affect the ability to recoup all types of unlawful taxes, NARFE and its members nationwide are interested in assuring that states cannot stack the deck against them and other taxpayers who seek refunds of erroneously or unlawfully collected taxes.

The Military Coalition is a voluntary association of 25 military-related organizations that was formed six years ago. Collectively, its constituent organizations represent the interests of almost two million members who are retired, reserve and active members of the Uniformed Services of the United States. The Military Coalition is dedicated to providing a cohesive means for the study and advocacy of issues impacting upon the maintenance of a strong national defense and the preservation of rights and benefits its varied constituents have earned through years of dedicated service to the United States.

Resolution of the issues presented in this petition are of vital interest to the Military Coalition and the members of its constituent organizations. Not only do some of these members live in states where *Davis* litigation is ongoing, but all its members are interested in seeing a fair and evenhanded mechanism for challenging unconstitutional state taxation.

The designated federal retirees in Arizona, North Carolina, Virginia and Wisconsin are all class representatives of suits in their respective states seeking relief for the unconstitutional imposition of taxes on their federal pensions, or the failure to refund such taxes. While partial resolution of the *Davis* litigation has been announced or implemented in some of these states, nonetheless until all the remaining issues in these states are finally resolved, these class representatives will remain interested in all the legal issues arising out of the *Davis* litigation.

For these reasons, *amici* desire to have their voices heard in this case. This is not a case that simply involves one state or presents one isolated issue. The ramifications of the decision below are widespread and there are over two and a half million individuals who are interested in seeing that that decision is reviewed and reversed. Accordingly, pursuant to Rule 37.2, *amici* move for leave to file this brief in support of petitioners.

Respectfully submitted,

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QUESTION PRESENTED

Whether the Fourteenth Amendment prohibits states from constantly shuffling and reshuffling the remedies that putatively are available to vindicate unconstitutional state taxation.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-766

EUGENE H. DUFFY, *et al.*,
Petitioners,

v.

JAMES W. WETZLER, *et al.*

On Petition for a Writ of Certiorari to the Supreme Court of New York Appellate Division-Second Judicial Department

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BRIEF *AMICI CURIAE* OF THE NATIONAL ASSOCIATION OF RETIRED FEDERAL EMPLOYEES, THE MILITARY COALITION AND DESIGNATED FEDERAL RETIREES IN ARIZONA, NORTH CAROLINA, VIRGINIA AND WISCONSIN IN SUPPORT OF PETITIONERS

The National Association of Retired Federal Employees ("NARFE"), the Military Coalition and designated federal retirees in Arizona, North Carolina, Virginia and Wisconsin file this brief *amici curiae* in support of petitioners and urge this Court to grant the petition for a writ of certiorari and vacate and remand the decision of the court below.

INTEREST OF *AMICI*

Amici are NARFE, the Military Coalition and designated federal retirees in Arizona, North Carolina, Virginia and Wisconsin. NARFE is a not for profit corporation

that is dedicated to serving and protecting the interests of federal civil service retirees and the federal retirement systems. As more fully set out in the foregoing motion, NARFE and its members are vitally interested in the issue of taxpayers' entitlement to receive refunds of unconstitutional state taxation.

The Military Coalition is a voluntary association of 25 military-related organizations that was formed six years ago. *See* App. A at 1a-8a (providing a listing of its component organizations). Collectively, its constituent organizations represent the interests of almost two million members who are retired, reserve and active members of the Uniformed Services of the United States. As more fully stated in the preceding motion, the Military Coalition is dedicated to providing a cohesive means for the study and advocacy of issue impacting upon the maintenance of a strong national defense and the preservation of rights and benefits its varied constituents have earned through years of dedicated service to the United States. It and the members of its constituent organizations are affected directly by the decision below.

The designated federal retirees in Arizona, North Carolina, Virginia and Wisconsin are all class representatives of suits in their respective states seeking relief for the unconstitutional imposition of taxes on their federal pensions, or the failure to refund such taxes. *See* Appendix A at 8a-9a (listing individual class representatives). They, or litigants from their states, have previously appeared in this Court as parties seeking the same or similar relief.

STATEMENT

This case is but the latest in a steady stream of cases coming to this Court challenging a state's refusal to fully refund taxes imposed on federal retirees in violation of 4 U.S.C. § 111. After this Court decided *Davis v. Michigan Department of Treasury*, 489 U.S. 803 (1989), some states immediately refunded these unconstitutional taxes.

See, e.g., Hackman v. Director of Revenue, 771 S.W.2d 77 (Mo. 1989), *cert. denied*, 493 U.S. 1019 (1990); *Burns v. New Mexico*, No. SF 89-1314(c) (1st Jud. Dist. Sante Fe County Apr. 5, 1990). The remaining states dug in; although many have since capitulated, today, over five and a half years after this Court decided *Davis*, and a year and a half after this Court decided *Harper v. Virginia Department of Taxation*, 113 S. Ct. 2510 (1993), the states' war of attrition against the federal retirees continues in more than half a dozen states.[1]

The states' war of attrition has been fought on several fronts. First and foremost, the states sought to rely on nonretroactive decisionmaking to deny refunds, but the nonretroactivity defense was finally laid to rest in *Harper v. Virginia Department of Taxation*, 113 S. Ct. 2510 (1993). Several states also sought to distinguish between military and civil service retirees, contending that there were "significant differences" between military retirees and state government retirees justifying the discriminatory taxation. This effort was thwarted by this Court's decision in *Barker v. Kansas*, 112 S. Ct. 1619 (1992). Most states got the message from *Barker* and *Harper* and ended their litigation thereafter.[2] The stalwart few, however, simply

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[1] On December 6, 1994, this Court reversed the Supreme Court of Georgia in *Reich v. Collins*, U.S. No. 93-908, thereby (presumably) ending the litigation in Georgia. In addition to the present case out of New York, North Carolina has a petition pending in this Court. *Swanson v. North Carolina*, U.S. No. 93-1882. Litigation is ongoing on remand in *Harper*, Record No. 940326 (Supreme Court of Va.); in Kentucky, *Commonwealth of Kentucky Revenue Cabinet v. Gossum*, Nos. 92-SC-001041-TG, 94-SC-216 TX (Ky. Sep. 1, 1994) (state's petition for rehearing pending); Wisconsin, *Department of Revenue v. Hogan*, Case No. 93-CV-2532 (Cir. Ct. Dane Cty.); Arizona, *Bohn v. Waddell*, No. 1 CA-TX, 94-009 (Ariz. Ct. App.); and Oregon, *Dixon v. Oregon*, No. 9311-07480 (Cir. Ct. Multnomah Cty.).

[2] *See, e.g., Pledger v. Bosnick*, 113 S. Ct. 3034 (1993); *Strelecki v. Oklahoma Tax Commission*, 872 P.2d 910 (Okla. 1993); *Brumley*

retooled. Like Georgia, they focused their efforts on showing that their states provided adequate predeprivation remedies sufficient to obviate the need for postdeprivation relief. The State of New York and New York City were among those adopting this post-*Harper* line of defense.

New York hewed this line for exactly a year after this Court remanded this case for further consideration in light of *Harper*. Then, on June 27, 1994, New York's Governor capitulated: he anounced that New York should honor all federal retirees' timely-filed refund claims. In an extraordinary sequence of events, the New York courts held that this unilateral action rendered moot all of petitioners' claims, including those for class-wide relief and for relief under 42 U.S.C. §§ 1983 and 1988. Significantly, the court below made this ruling before any claims were actually paid. And, while New York represented to the court below that it would be refunding $62 million of unconstitutionally assessed taxes, in fact it has refunded only half that much. Petitioners' applications and writ of certiorari in this Court followed.

REASONS FOR GRANTING THE PETITION

This case raises questions of substantial public importance concerning the propriety of states retaining taxes collected in violation of the Constitution and statutes of the United States. Like *Reich*, and like *Swanson v. Powers*, this case is but a minor variation of the recurring theme of the states nullifying constitutionally protected rights by manipulating the state remedies available to protect those rights. The court below has sanctioned the facile orchestration of state law to deprive a large segment of the federal retiree class the same relief the State and New York City grudgingly, and belatedly, had conceded

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v. Utah Tax Commission, 868 P.2d 796 (Utah 1993); *Hagge v. Iowa Department of Revenue*, 504 N.W. 2d 448 (Iowa 1993); *Bass v. South Carolina*, 113 S. Ct. 3025 (1993); *Sheehy v. Montana*, 113 S. Ct. 3025 (1993); *Marx v. Broom*, 632 So.2d 1315 (Miss. 1994).

is their due. Review by this Court is necessary to assure that the mandate of *Reich* is heeded in New York and in each state in which *Davis* litigation is extant.

1. In *Reich*, this Court unanimously rebuffed Georgia's attempt to deny federal retirees relief from the unconstitutional taxes imposed upon them. The Court held that states may not

> hold out what plainly appears to be a "clear and certain" postdeprivation remedy and then declare, only after the disputed taxes have been paid, that no such remedy exists.

Reich v. Collins, No. 93-908, slip op. at 1. This holding should be broad enough to resolve all the remaining *Davis* cases: central to each of those cases is a variation of the same "bait and switch" this Court condemned in *Reich*. *Id.*, slip op. at 4.

This case is in many ways indistinguishable from *Reich*. Indeed, it may be that this case is but the next generation of *Reich*. Perhaps foreseeing this Court's decision in *Reich*, New York refined its strategy: rather than rely on manipulation of preexisting law to avoid liability altogether, New York "reconfigure[d] its scheme, unfairly, in *midcourse*" [3] merely to *limit* its liability. But this effort too must fail, for New York has limited its liability only by denying relief to some but not all of the federal retiree class. That is, while New York is providing adequate relief to a relative handful of retirees, it is treating those retirees to whom it is denying relief just as Georgia treated Colonel Reich.

Throughout the course of this litigation, New York has espoused a variety of contradictory positions, adapting its stance to the exigencies of the moment without consideration of the positions it had previously taken. *See* Pet. at 10-11 (stating New York's "top ten" list of changing

[3] *Reich*, slip op. at 4.

positions). The net effect of this pliability is that New York's game of "bait and switch" has succeeded in depriving a large segment of the federal retiree class of "meaningful backward-looking" relief.

For example, New York officials publicly stated that retirees need not take any steps to protect their refund rights; that if refunds were paid they would be paid to all federal retirees. Pet. at 10. Now, however, contrary to this statement, refunds are being paid only to those federal retirees who timely filed refund claims. Similarly, while New York had previously taken the position that a refund claim for any year would be treated as a claim for all years open under the statute of limitations, it is now refusing to apply its own settled law, instead holding federal retirees to a rigorous and unprecedented requirement that they file separate claims for each tax year.

That is, until this case, informal refund claims were acceptable so long as the state was fairly put on notice of the nature of the claim. Indeed, case law established that notice to the state was adequate even where the facts were provided by another similarly situated taxpayer. *In re Crispo,* WESTLAW: 1994 WL 268092 (N.Y.Div.Tax. App.), at *3. There is no doubt in this case that the state was on fair notice of the refund claims at issue, if for no other reason than the filing of $32 million of "adequate" claims. *Id.* Moreover, the state's representation to the court below that there were $62 million worth of refund claims at issue was predicated on a precise understanding of how much was owed and to whom.

Rather than pay these retirees what they were admittedly owed, the state formulated a new technical barrier to limit its liability.[4] Georgia tried this gambit to

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[4] New York law allows a three year statute of limitations for filing of a "[c]laim for credit or refund" and specifically references the Internal Revenue Code for definition of terms. *See* Pet. at 47a. Federal law, like New York law, imposes no formal requirement on the form of a refund claim and allows for liberal amendment

avoid liability, and this Court firmly upbraided it for doing so. New York's gambit is no more tolerable simply because it is designed merely to halve its liability rather than eliminate it. Accordingly, this Court should grant the petition, vacate the decision of the court below and remand it for further consideration in light of *Reich*.

2. New York played the *Reich* game in its treatment of petitioners' § 1983 claims, but with a twist: instead of changing the rules midcourse, it simply ignored them. First, the court below ignored this Court's mandate to reconsider its prior decision in light of *Harper*. The court below utterly failed to reconsider the § 1983 claims. *See* Pet. at 4a. While this defiance is reason enough to reverse the decision below, just as significantly, the lower court's dismissal of petitioners' § 1983 claims is completely contrary to established federal law.

Foremost, petitioners raised a § 1983 claim against the City of New York. The court below dismissed this claim because it found that neither the City nor any of its officials were responsible for enforcing the tax. Pet. at 34a, 22a (holding that the § 1983 claim was defeated by qualified immunity). Yet as the City ultimately conceded, qualified immunity is simply unavailable as a defense to a § 1983 action against a municipality. *Owen v. City of Independence*, 445 U.S. 662, 638 (1980); *American Trucking Assns. v. Smith*, 496 U.S. 167, 185 (1990). Petitioners' § 1983 claim against New York City is the paradigm claim—neither nonretroactivity (*Owen*, 445 U.S. at 655) nor qualified immunity provided any basis to absolve the City of its liability for its denying

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of any claim, even after the controlling statute of limitations has run. *United States v. Kales*, 314 U.S. 186 (1941). Thus, for example, a federal retiree's May 1989 claim seeking a refund for "all taxes imposed in violation of *Davis*" would orinarily be sufficient to state a claim for a refund of all taxes paid in 1986 and thereafter. For purposes of this case, however, New York has taken the position that such a claim would be sufficient to state a claim for a refund of 1986 taxes only.

the federal retirees rights protected by federal law. In failing to hold the City liable, the court below simply flouted controlling federal law.

Moreover, the court below erred in dismissing petitioners' § 1983 claims against the State officials. Even apart from this Court's mandate to reconsider the § 1983 claims, the court below was required to consider *all* relevant precedents, including intervening precedents, in determining these claims. *Elder v. Holloway*, 114 S. Ct. 1019, 1021 (1994). Yet the court below failed to apply *Hafer v. Melo*, 502 U.S. 21, 112 S. Ct. 358, 362-63 (1991) (holding that state officials may be held individually liable for acts performed in the course of their official duties); *Collins v. City of Harker Heights*, 112 S. Ct. 1061, 1065 (1992) (§ 1983 does not require proof "of an abuse of governmental power separate and apart from the proof of a constitutional violation"); and *Buckley v. Fitzsimmons*, 113 S. Ct. 2606, 2620 (1993)) (Scalia, J., concurring) (state officials bear the "burden of showing that the conduct for which [they seek] immunity would have been privileged at common law in 1871."). Moreover, the court below failed to recognize that the State officials had waived whatever immunity they might otherwise have enjoyed. That is, the State officials averred that they acted without discretion in violating the federal retirees' rights. Qualified immunity, however, only insulates officials who are exercising discretionary functions. *Westfall v. Erwin*, 484 U.S. 292, 298 n.4 (1988).

By ignoring this Court's municipal liability and personal capacity decisions, the court below has created a § 1983 jurisprudence all its own. In so doing, New York, like Georgia and Virginia, has transformed taxpayer remedies into a shell game of now-you-see it, now-you-don't and precedent into cheesecloth. The decision below is unsustainable and, accordingly, this Court should grant, vacate and remand for consideration of *Reich* as well as this Court's recent § 1983 decisions.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari to the Supreme Court of New York, Appellate Division, should be granted and its decision vacated and remanded in light of *Reich*.

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APPENDIX

APPENDIX A

MEMBERS OF THE MILITARY COALITION

THE RETIRED OFFICERS ASSOCIATION (TROA)

The Retired Officers Association was founded in 1929 and has approximately 395,000 members. Membership in the Association is open to all past and present, active, reserve and retired commissioned and warrant officers in any of the seven uniformed services. The organization's mission is to support strong national defense and to represent membership on retirement and benefit issues before Congress.

AIR FORCE ASSOCIATION (AFA)

The Air Force Association was founded in 1946 and has approximately 200,000 members. Membership is open to anyone who has served in the U.S. armed forces. Other American citizens may affiliate as patrons. The organization's mission is to promote public understanding of aerospace issues and national security requirements to ensure strong support of the nation's defense and the men and women who serve in the U.S. Air Force.

AIR FORCE SERGEANTS ASSOCIATION (AFSA)

The Air Force Sergeants Association was founded in 1961. It has approximately 165,000 members and is composed of active and retired enlisted personnel in the Air Force, Air National Guard, Air Force Reserve, Army Air Corps and Army Air Force. Its members belong to 198 chapters throughout the world and the purpose of the organization is to serve as the voice of Air Force enlisted service members.

ASSOCIATION OF MILITARY SURGEONS OF THE UNITED STATES

The Association of Military Surgeons of the United States received its Congressional Charter in 1908. Its

membership consists of 17,000 members and is open to all past and present commissioned officers or GS-9 and above civilians in the medical services of the United States Air Force, the United States Air Force Reserve, the United States Army, the United States Army Reserve, the Air National Guard, the Army National Guard, the United States Public Health Service and the Veterans' Administration; officers of military medical services of other nations; and past and present medical consultants to the chiefs of the federal medical services. The purpose of the Association is to improve the nation's federal health care system.

ASSOCIATION OF U.S. ARMY (AUSA)

The Association of U.S. Army was founded in 1950 and has approximately 135,000 individual and 250 industrial members. Membership is open to all active, reserve and civilian personnel in the Army, and any person subscribing to the association's bylaws. The purpose of the organization is to foster public understanding and support of the Army and the people who serve in it.

CHIEF WARRANT AND WARRANT OFFICERS ASSOCIATION, U.S. COAST GUARD (CW & WOA)

The Chief Warrant and Warrant Officer's Association was founded in 1929 and has approximately 3,300 members. Membership is open to active duty, reserve and retired Coast Guard warrant and chief warrant officers. The association's purpose is to advance members' professional abilities.

COMMISSIONED OFFICERS ASSOCIATION OF THE U.S. PUBLIC HEALTH SERVICE, INC. (COA)

The Commissioned Officers Association of the U.S. Publis Health Service was founded in 1937 and has approximately 7,500 members. Membership is open to ac-

tive duty, retired, inactive reserve and former commissioned officers of the U.S. Public Health Service. The purpose of the organization is to ensure that the interests and welfare of commissioned officers of the USPHS are protected.

ENLISTED ASSOCIATION OF THE NATIONAL GUARD OF THE U.S. (EANGUS)

The Enlisted Association of the National Guard of the U.S. was founded in 1962 and has approximately 67,000 members. Membership is open to enlisted members of the National Guard through state associations and associate membership is open to all individuals through state associations. The purpose of the association is to promote and maintain adequate national security; and to foster the status, welfare and professionalism of enlisted members of the National Guard.

FLEET RESERVE ASSOCIATION (FRA)

The Fleet Reserve Association was founded in 1922. It has approximately 170,000 members who are active duty, retired enlisted personnel and commissioned officers with prior service in the Navy, Marine Corps and Coast Guard. The Association is chartered under the laws of Pennsylvania and its purpose is to represent its members on military personnel legislative matters before Congress.

MARINE CORPS LEAGUE (MCL)

The Marine Corps League was founded in 1923 and has approximately 40,000 members. Membership is open to those who served in the Marine Corps. The organization's mission is to preserve the traditions, to promote the interests of the Marine Corps, to voluntarily aid and render assistance to all Marines and former Marines, as well as to their widows and orphans.

MARINE CORPS RESERVE OFFICERS ASSOCIATION (MCROA)

The Marine Corps Reserve Officers Association was founded in 1928 and has approximately 5,700 members. Membership is open to all Marine officers and officers of other U.S. services who served with Marines. The association's mission is to support and strengthen the Marine Corps, its reserve and reserve officers.

NATIONAL ASSOCIATION FOR UNIFORMED SERVICES/SOCIETY OF MILITARY WIDOWS (NAUS/SMW)

The National Association for Uniformed Services/ Society of Military Widows was founded in 1968 and has approximately 155,000 members. NAUS/SWM membership is open to all active, retired and former members of the uniformed services, their families and survivors. The association's mission is to represent members' interests by supporting legislation that upholds the security of the United States, sustains the morale of the uniformed services and provides fair and equitable consideration for all.

NATIONAL GUARD ASSOCIATION OF THE UNITED STATES (NGAUS)

The National Guard Association of the U.S. was founded in 1878 and has approximately 54,000 members. membership is open to all present and former officers of the Army and Air National Guard, corporate and individudal associate membership. The association's mission is to improve the readiness of the National Guard and to provide personnel benefits and entitlements for the half million members of the National Guard.

NATIONAL MILITARY FAMILY ASSOCIATION (NMFA)

The National Military Family Association was founded in 1969 and has approximately 10,000 members. Mem-

bership is open to active duty, retired and reserve component members of the seven uniformed services and their family members. The association's mission is to serve as an advocate for uniformed service families and to educate and inform them concerning issues affecting their lives.

NAVAL ENLISTED RESERVE ASSOCIATION (NERA)

The Naval Enlisted Reserve Association was founded in 1957. It has 15,000 members and its membership is open to active, inactive, and retired enlisted reservists in the Navy, Marine Corps and Coast Guard. The Association's mission is to focus on members' interests, morale and well-being, and readiness and training of sea service reserve forces.

NAVAL RESERVE ASSOCIATION (NRA)

The Naval Reserve Association was founded in 1954 and consists of 25,000 members. Membership in the Naval Reserve Association is open to active, inactive and retired Naval Reserve officers and its purpose is to maintain and strengthen the nation's defense by ensuring a continued strong Navy and Naval Reserve.

NAVY LEAGUE OF THE UNITED STATES (NLUS)

The Navy League of the United States was founded in 1902 and has approximately 68,000 members. Membership is open to civilians, military reservists and retirees. The league's mission is to maintain a strong U.S. maritime posture through support of the Navy, Marine Corps, Coast Guard and Merchant Marine.

NON COMMISSIONED OFFICERS ASSOCIATION OF THE UNITED STATES (NCOA)

The Non Commissioned Officers Association of the United States is a patriotic, civic and fraternal organization operating under Texas Corporate Charter. The Association was founded in 1969 and has more than 160,000 retired or veterans of the United States armed forces in the grades E-4 thru E-9. The purpose of the Association is to promote and protect the rights and benefits of active duty and veteran non commissioned officers and petty officers in all five branches of the armed forces and provide opportunities for them to join in patriotic, fraternal, social and benevolent activities.

RESERVE OFFICERS ASSOCIATION OF THE UNITED STATES (ROA)

The Reserve Officers Association of the United States was organized in 1922, and chartered by Congress in June 1950. Originally, the Reserve Officers Association consisted solely of Army Officers, Reserve Officers, National Guard Officers, and Retired Officers. Following World War II, the Reserve Officers Association expanded its membership to all services and it now has approximately 100,000 members. The purpose of the Association is to ensure an adequate total force of all services including both active and reserve components, and a force that is mobilization ready to meet any contingency.

THE JEWISH WAR VETERANS OF THE UNITED STATES OF AMERICA (JWV)

The Jewish War Veterans of the United States was founded in 1896 and has approximately 100,000 members. Membership is open to veterans of war time service of the Jewish faith. The organization's mission is service to veterans, Americanism, and to provide a voice on the Hill for veterans' legislation and benefits.

THE MILITARY CHAPLAINS ASSOCIATION (MCA)

The Military Chaplains Association was founded in 1925 and chartered by the 81st Congress in 1950. It has approximately 1,300 members. Membership is open to all chaplains of the Army, Navy, Air Force, VA and Civil Air Patrol, active duty, reserve, retired and former. The organization's mission is to safeguard and strengthen the forces of faith and morality of our nation; to perpetuate and to deepen the bonds of understanding and friendship in our military services; to preserve spiritual influence and interest in all members and veterans of the armed forces; to uphold the Constitution of the United States; and to promote justice, peace and goodwill.

THE RETIRED ENLISTED ASSOCIATION (TREA)

The Retired Enlisted Association was founded in 1968 and consists of 68,000 members. Its membership is made up of enlisted retirees from all branches of the armed services and their surviving spouses. The mission of the association is to represent retired enlisted personnel and protect retiree military benefits.

U.S. ARMY WARRANT OFFICERS ASSOCIATION (USAWOA)

The U.S. Army Warrant Officers Association was founded in 1973 and has 9,000 members. Its members consist of National Guard active duty, reserve and retired Army warrant officers. The purpose of the association is to recommend improvement of the Army, and promote technical and professional information among warrant officers.

U.S. COAST GUARD CHIEF PETTY OFFICERS ASSOCIATION (CPOA)

The U.S. Coast Guard Chief Petty Officers Association was founded in 1969. Its 11,600 members are active, retired, and reserve Coast Guard chief petty officers. The mission of the association is to promote the welfare of chief petty officers, to promote and protect the rights and benefits of all armed forces personnel and aid in Coast Guard recruiting.

UNITED ARMED FORCES ASSOCIATION (UAFA)

The United Armed Forces Association was founded in 1986 and has approximately 15,760 members. Formed to serve all ranks and branches of the Armed Forces, Veterans, Civil Service, active and retired and their dependents, the association's purpose is to promote the social, political, and economical welfare of its members.

ARIZONA *AMICI*

The litigants are the Estate of John L. Bohn, Shirley Bohn, Donald and Mary Rutan, Carl Linton, Arthur Abbott, who are retired federal employees, their estates or personal representatives; and, under the doctrine of virtual representation, the class of approximately 65,000 other retired federal employees, their estates and personal representatives. *Bohn v. Waddell,* No. 1 (A-TX, 94 — ——— (Ariz. Ct. App.) (Bohn II).

NORTH CAROLINA *AMICI*

North Carolina *amici* are Norman W. Swanson and 393 other named Class A petitioners and seven named Class B petitioners who represent the certified class of federal retirees who have been unconstitutionally taxed by the State of North Carolina and whose petition is pending before this Court in No. 93-1882.

VIRGINIA *AMICI*

The palintiffs in *McClelland v. Payne*, No. 94-2084 (4th Cir.), include:

JOHN F. MCCLELLAN;
THOMAS B. WORSLEY; and
CHRISTOPHER J. GIAIMO,

for themselves individually and for all other similarly situated as representatives on behalf of a putative class of approximately 185,000 similarly situated civilian and military annuitants of the federal government whose federal pensions were subject of taxation by Virginia.

WISCONSIN *AMICI*

J. Gerard Hogan, on behalf of himself and as representative of the certified taxpayer class in *Wisconsin Department of Revenue v. Hogan*, No. 93-CV-2549 *et al., pet. for rev. pend'g*, Cir. Ct. Dane Cty.

Supreme Court, U.S.
FILED
DEC 22 1994
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No. 94-766

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

EUGENE H. DUFFY, *et al.*,
Petitioners,

v.

JAMES W. WETZLER, *et al.*,
Respondents.

Petition for a Writ of Certiorari to the Supreme Court of the State of New York Appellate Division—Second Judicial Department

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

The petitioners respectfully submit this Reply Brief in response to the Briefs in Opposition filed by respondents. In light of this Court's decision in *Reich v. Collins*, —— U.S. ——, No. 93-908 (December 6, 1994), petitioners request that their petition for a writ of certiorari be granted.

REASONS FOR GRANTING THE WRIT

This Court has made abundantly clear, as it just held in *Reich*, slip op. at 1, that a "clear and certain" remedy is required here to satisfy due process:

> In a long line of cases, this Court has established that due process requires a "clear and certain" remedy for taxes collected in violation of federal law. *Atchison, T. & S.F.R. Co. v. O'Connor*, 223 U.S. 280, 285 (1912) (Holmes, J.).

New York, however, did not provide a "clear and certain" remedy. Although it initially led taxpayers to believe that, as the New York Tax Law apparently states, they had a postdeprivation refund right, New York subsequently claimed that right did not exist, just as Georgia did in *Reich*. Again, as in Georgia, the "bait and switch" was on. As a result, approximately 20,000 of the 30,000 taxpayers entitled to relief have received nothing and will receive nothing absent further court action.

I. THE DECISION BELOW FLOUTS THE MANDATE OF THE COURT IN *DUFFY I*

Respondents claim that the Second Department did not flout the mandate of the Court in *Duffy I* because it was not required to reexamine all of the holdings in its prior decision. Respondents contend that the Court's mandate required *only* further consideration by the Second Department "in light of *Harper*" [1], and that *Harper* did not specifically address the remaining issues raised by this petition, including a § 1983 damages cause of action, class certification or attorneys' fees. The respondents'

[1] *Harper v. Virginia Dep't of Taxation*, 113 S. Ct. 2510 (1993).

assertion is "entirely beside the point". *Reich*, slip op. at 4. As *Reich* makes clear, when a case is remanded for further consideration in light of another decision, the court below may not ignore cases relied on therein or "the long line of cases upon which" the holding depends. *Id.* at 3.

Indeed, respondents' latest reading of *Harper* is both incomprehensible and untenable. They state:

> Thus, the [Second Department] on remittitur for further consideration in light of *Harper* was required to consider the issues of remedy and the adequacy under the Due Process Clause of the State's predeprivation procedures if the refunds could be denied under State law.

(State's Brief at 14). Neither *Harper* nor any holding of the Court can reasonably be read to so state. Rather, due process simply requires a "clear and certain remedy". As this Court just made explicit in *Reich*, the remedy can be a predeprivation one, a postdeprivation one or a hybrid. The remedy can be changed over time.

The Second Department was, however, required to examine the entire remedy available in New York, test it against the requirements of due process and, unless there was a "clear and certain" remedy available, fashion "meaningful backward-looking relief." *Harper*, 509 U.S. at ——, quoting *McKesson Corp. v. Florida Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18, 31 (1990). The Second Department's failure to do so was a failure to reexamine its decision "in light of *Harper*". *Harper* requires no less. The mandate requires just that.[2]

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[2] Respondents' further argument that the mandate did not refer to the Court's holdings in *Hafer v. Melo*, 502 U.S. 21 (1991), *Howlett v. Rose*, 496 U.S. 356, *on remand*, 571 So.2d 29 (Fla. 1990), *Collins v. City of Harker Heights*, 112 S. Ct. 1061 (1992) and, therefore, these subsequent holdings need not be considered in the Second Department's reexamination of its decision is equally frivolous. Indeed, the Court made clear in *Elder v. Holloway*, 114 S. Ct. 1019 (1994), that an appellate court must consider all relevant precedents whether or not considered by the court of first instance.

The Second Department failed to follow the mandate. Instead, it permitted the very "bait and switch" condemned by this Court in *Reich*. In an unheard of "procedure", without receiving briefs by the parties on the effect of the State's unilateral determination to pay certain refunds, without a motion by the State relating to the remaining issues on appeal, despite a scheduled argument date on petitioners' motion for emergent relief which they had been granted on a temporary basis, and without advising the parties as to whether or not there would be oral argument on the appeal on remand, out of the blue, with no prior notice, the Second Department took note of an extrajudicial event described to it in a letter and rendered its decision. Due process? Following the mandate in *Duffy I*? As this Court made clear in *Reich* and in *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958), absolutely not.

II. AS IN *REICH*, RESPONDENTS HAVE ENGAGED IN A "BAIT AND SWITCH" AND PETITIONERS HAVE BEEN DENIED THE MEANINGFUL, BACKWARD-LOOKING RELIEF REQUIRED BY THE CONSTITUTION

Respondents effectively admit that there was no "clear and certain" remedy in New York. In addressing petitioners' "top ten" list of contradictory representations made by respondents concerning the remedy available (Pet. at 10-11), the City respondents state in part:

> To the extent these statements are varied and seemingly contradictory, they merely reflect the state of flux in which the law existed regarding the issues of refunds . . .

(City Brief at 12). To be clear and certain, there can be no *state of flux*. Respondents may not create a state of confusion, have taxpayers rely on those varying statements and then select from the remedial scheme one aspect of permitted relief and assert that it is the sole remedy available, to the detriment of those who pursued relief which otherwise also appeared to be available.

Due process demands more. In this case, as in *Reich*, it requires "meaningful backward-looking" relief. The partial refund paid by New York to some but not all taxpayers for some but not all tax years within the statute of limitations is inadequate as a matter of law.

As detailed in the petition and below, New York has done exactly what this Court held in *Reich* that states may not do:

> [H]old out what plainly appears to be a "clear and certain" postdeprivation remedy and then declare, only after the disputed taxes have been paid, that no such remedy exists.

Id., slip op. at 1.

As in Georgia, in New York, prior to this *Davis*-related case, it appeared that there was a "clear and certain" right to a postdeprivation refund. *See, e.g.*, Pet. App. G at 47a. New York relied on that apparent "clear and certain" right to a refund in successfully opposing petitioners' motion for a preliminary injunction at the commencement of this case. (R. 199, 200, 314, 316). Georgia had a similar experience in avoiding injunctive relief.[3] New York represented to the Third Circuit in *Hardwick v. Cuomo*, 891 F.2d 1097, 1105 (3d Cir. 1989), that New York taxpayers are entitled to refunds of unconstitutional taxes.[4] Again, there was a parallel in Georgia.[5]

Notwithstanding this "clear" vision of a "certain" refund right, in New York, as in Georgia, the rules changed

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[3] *Cf. Collins v. Waldron*, 259 Ga. 582, 583, 385 S.E.2d 74, 75 n.1 (1989) (dissolving injunction and holding that Georgia's refund statute provided federal retirees an adequate remedy at law).

[4] There, New York's Attorney General represented that:

> '[There is] not . . . a single case in which New York State refused to refund monies collected pursuant to a provision of the Tax Law or, specifically, the personal income tax provisions of Article 22, later declared unconstitutional.'

[5] *See Waldron v. Collins*, 788 F.2d 736, 738, *cert. denied*, 479 U.S. 884 (1986) (reaching a similar conclusion with respect to Georgia's statutory law at issue in *Reich, supra*).

once this *Davis*-related case was commenced. The "bait and switch" was on. As set forth in the petition, New York denied every aspect of the remedy sought claiming, as expediency would serve it, either that another aspect of the remedial scheme should have been sought or was exclusive or that no remedy was available despite what the statutes say and despite how taxpayers had been misled by those statutes and by the State's pronouncements to the taxpayers. Indeed, respondents went so far as to announce that the Legislature had repealed or "delimited" the refund right; the same right they now claim was "clear and certain" and should be exclusive.[6] As in *Reich*, "what [New York] did here, is to reconfigure its scheme, unfairly, in mid-course." *Reich*, slip op., at 4. Due process does not permit this course of conduct. *Brinkerhoff-Faris Trust and Savings Co. v. Hill*, 281 U.S. 673 (1930).

This case seeks remedies for the indisputable violations of the federal rights of the putative class. This Court has consistently held that where, as here and in *Reich*, the state did not provide a "clear and certain" remedy, the Constitution requires remedies which provide "meaningful, backward-looking relief". *Reich*, slip op. at 7. In this case, *inter alia*, a § 1983 damages claim, class certification and the right to common fund or class action counsel fees are necessary in order to provide such relief and are not deniable under State law in contravention of petitioners' federal rights.

The respondents' assertions concerning the failure of the Second Department to reexamine the § 1983 damages claims are disingenuous.[7] The respondents were directly

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[6] Respondent Wetzler asserted this position as early as July 21, 1989, well before the statute of limitations had run within which to bring refund claims. *See* Brief of State of New York Defendants-Appellants, to the Second Department, October 25, 1990.

[7] The briefs in opposition are rife with assertions, distortions and misrepresentations not supported by the record. For example,

involved in the violations of petitioners' federal rights. *See, e.g.*, R. 442-43, 521-30. In addition, the respondents defended the individual capacity claims on the very basis rejected by the Court in *Hafer v. Melo*, 502 U.S. 21 (1991). *See* State Defendants' Memorandum of Law in Support of Motion for Summary Judgment, January 17, 1990 at 13. Had the Second Department reconsidered its decision in accordance with the Court's mandate in *Duffy I*, it would have been obligated to reverse itself. *Hafer v. Melo*, 502 U.S. 21 (1991). The Second Department's failure to do so underscores the *novelty* with which this case was disposed of upon remand from this Court. For example, in cases other than this, there is no question but that Respondent Wetzler is amenable in New York courts to claims under § 1983. *See Radio Common Carriers of N.Y., Inc. v. State of N.Y.*, 601 N.Y.S.2d 513 (Sup.Ct. N.Y. County 1993).

Similarly unpersuasive are the respondents' efforts to avoid the federal questions presented by the Second Department's refusal to reexamine class certification.[8] Upon remand from this Court, the Second Department had "a constitutional duty 'to proceed in such manner that all the substantial rights of the parties under controlling federal law were protected.' " *Felder v. Casey*, 487 U.S. 131, 151 (1988) (citations omitted). The breach of this duty by the Second Department conditioned the right to bring a § 1983 class suit "against the very persons and entities Congress intended to subject to liability." *Id.* at 144-45.

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it is asserted that no prospective relief was obtained under § 1983. State Brief at 15. This is false. It was as the result of this lawsuit that New York's scheme was remedied for years 1989 and after. (R. 187, R2. 130). Respondents have also been permanently enjoined under § 1983 from enforcing the scheme against all federal retirees from whom a liability was claimed for the years prior to 1989. Pet. App. A at 3a.

[8] The respondents' position highlights the "threat to federal rights posed by the [aberrant] view that the procedures followed in state court litigation of federal questions are issues of state law." Meltzer, *State Court Forfeitures of Federal Rights*, 99 Harv. L. Rev. 1128, 1136 (1986).

It is indisputably an important federal question warranting review by this Court. *Id. See also Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 809 (1985) ("[M]ost of the plaintiffs would have no realistic day in court if a class action were not available.")

Absent class certification as part of the relief provided in this case,[9] most of those who should receive relief will get none. The State will benefit by having confused taxpayers as to what they could do or had to do to be made whole. The premise of respondents' position and the ruling of the court below denying class certification is that denial is appropriate where governmental operations are involved and future plaintiffs will be protected by *stare decisis.*

No such protection occurred here. We are now in our sixth year of litigating this case. The statute of limitations for requests for refunds and for § 1983 claims is less than that. *See, e.g.*, New York Tax Law § 687(a). By the time this case is concluded, respondents will argue that no further claims may be brought.[10] That result may be "meaningful", but not in a way that those who are supposed to receive relief would have expected.

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[9] Respondents suggest that because Virginia, the State at issue in *Harper*, unlike New York, does not provide for class certification, that due process cannot require class certification in this case. That argument is meritless. It is axiomatic that the remedies provided on a State by State basis may differ and yet all be consistent with due process. Here, however, New York law provides for class actions and the decision below was erroneous in its failure to grant class certification. As set forth in the petition (pp. 18-19) even if class certification could, in some instances under State law, properly be denied, those holdings may not serve to foreclose the § 1983 federal damages remedy sought in this case.

[10] The State respondents suggest that "the issue whether the class action mechanism can be used to toll the statute of limitations is not properly before this Court because petitioners have waived that issue." (State Brief at 21). The State respondents are wrong. Their position, however, underscores the importance of reversing the denial of class certification as sought in this petition.

States should not be rewarded for delay, obfuscation and misrepresentation as has occurred here. To be "meaningful", to be "backward-looking", the relief awarded should include class certification so that those whose rights were violated receive notice and an opportunity to be heard; an opportunity for relief.

Respondents have paid refunds only to those who guessed right and personally filed for refunds and only for the year or years for which filed. In addition to bringing this lawsuit, petitioner Duffy filed a refund claim on behalf of the entire class aggrieved in this case. (R. 514, R2. 639). This notice should have been sufficient under New York Law to provide refunds to all aggrieved. Under New York law, until the respondents extra-judicial act in this case, notice to the State was adequate where the facts of the taxpayer's claim were provided by another similarly situated taxpayer. *In re Crispo*, WESTLAW: 1994 WL 268092 (N.Y. Div. Tax App.), at 2-3. In this case, however, respondents have refused to recognize petitioner's filing as protecting the rights of others. The relief sought by this petition would achieve that protection by class certification or otherwise.

The Second Department did not, however, even reconsider class certification or other alternatives in fashioning the appropriate remedy here. It simply swallowed the "bait" and accepted the "switch". New York's sleight of hand also failed to reveal an alternative method pursuant to which "meaningful backward-looking relief" should have been provided. Pursuant to New York Tax Law § 697(d), the State should have refunded these illegal exactions to all who were aggrieved without regard to the statute of limitations.[11] *See* App. A at a-1. By the failure

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[11] Case law establishes that a refund claim for the erroneous payment of New York tax on a pension exempt from New York tax is not subject to the period of limitations under Section 687 but is instead governed by the special refund provisions of Section 697(d). *See Matter of Zimmet* [1968-1971 Transfer Binder—New Matters] N.Y. Tax Rep. ¶ 99-188 (CCH) (State Tax Commission 1968) (refunding taxes on erroneously included New York City

to consider these issues below, petitioners and the putative class were denied due process.

Similarly, an award of common fund or class action attorneys' fees and costs is both part of the remedy and vital to protect the due process rights of petitioners and future plaintiffs seeking to challenge actions in violation of federal law. *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326 (1980). Again, the Second Department failed to even reexamine this issue. Due process required that reexamination. Respondents' arguments concerning their views of an ultimate entitlement to an award, therefore, miss the mark.

Moreover, respondents should be embarrassed and ashamed of the positions to which they have stooped on this issue, including their argument that the taxpayers who have received relief did not benefit from the efforts of the attorneys' herein.[12] *See* State Brief at 22. Absent the effort by petitioners and their counsel, there would have been no relief in New York. Absent an ability for counsel here and in future cases to obtain a fee, there will be no more challenges by individual taxpayers of exactions contrary to federal law, except by the wealthy.[13] Due process

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pension); *Matter of Tompkins*, 1987 N.Y. Tax Lexis 1033 (State Tax Commission 1987) (refunding taxes on erroneously included New York State pension). Moreover, there is no requirement that a taxpayer explicitly invoke relief under section 697(d) to pursue the statutory entitlement to a refund thereunder. *See Matter of Ruszowski*, WESTLAW: 1991 WL 338502 (N.Y. Div. Tax App.) at 6.

[12] Here, too, is another example of the unabating conflicting positions taken by respondents. Previously, respondents have pronounced that all claims were subject to the results in this case. *See, e.g.*, Notice of New York State Department of Taxation and Finance dated August 31, 1993.

[13] Respondents' argument that the fact that counsel here have also been retained by approximately 650 taxpayers (325 couples) in a related action evidences that common fund or class action attorneys' fees are not necessary to provide an incentive to bringing such claims is, again, wrong. In view of the modest size of the average claim, such representation is not economically viable and these law firms would not do it again.

requires that the remedies available to encourage such claims be part of the "meaningful" relief afforded in this case.[14]

Respondents' concern here is purely selfish, not paternalistic. They know that, absent a *fee-sharing* ability, these claims cannot, as a practical matter, be brought. That self-interest is why the law is clear that they have no standing regarding this issue. *Boeing Co. v. Van Gemert,* 444 U.S. 472 (1980).

The policy issues here are vitally important. Respondents refer to "the good policy promoted by denying class certification and common fund attorneys' fees". City Brief at 23-24. Not surprisingly, they do not identify this policy. "Good" is also a curious way to describe such policy which results in gross injustice in this case and judicially approved injustice in the future. Due process is a better policy.

CONCLUSION

For the foregoing reasons, those set forth in the Brief *Amici Curiae* of the National Association of Retired Federal Employees, *et al.* in Support of Petitioners, as well as those previously set forth, the petition for a writ of certiorari to the Supreme Court of the State of New York, Appellate Division, Second Judicial Department, should be granted.

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[14] The issue of a class action or common fund fee award is not an issue of "fee-shifting" as respondents suggest. *See* State Brief at 22, City Brief at 23. These awards come from those who receive relief, not from a further assessment against the wrongdoer. In this case, however, by paying the entire amount of refunds it chose to make to certain taxpayers, under New York's attorney lien law (Judiciary Law § 475), respondents are themselves liable for such fees.

Respectfully submitted,

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APPENDIX

APPENDIX

EXCERPTS OF RELEVANT NEW YORK LAW

§ 697. General powers of tax commission

(d) Special refund authority.—Where no questions of fact or law are involved and it appears from the records of the tax commission that any moneys have been erroneously or illegally collected from any taxpayer or other person, or paid by such taxpayer or other person under a mistake of facts, pursuant to the provisions of this article, the tax commission at any time, without regard to any period of limitations, shall have the power, upon making a record of its reasons therefore in writing, to cause such moneys so paid and being erroneously and illegally held to be refunded and to issue therefor its certificate to the comptroller.